IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

ALLAN GORDON AND ELI TEMPKIN, PETITIONERS,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 4531

ALLAN GORDON Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

No. 4532

ELI TEMPKIN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Pleas and proceedings in the United States Court of Appeals for the Tenth Circuit, at the May Term, 1953, of said Court, before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

On the 10th day of July, A. D. 1953, the mandate of the Supreme Court of the United States, issued July 8, 1953, was filed in the office of the clerk of the United States Court of Appeals for the Tenth Circuit, in certain causes wherein Allan Gordon and Eli Tempkin were appellants, and United States of America was appellee, which said mandate is in the words and figures following:

[Mandate.]

United States of America, ss.

The President of the United States of America,

To the Honorable Judges of the United States Court of Appeals for the Tenth Circuit, Greeting:
(Seal)

Whereas, lately in the United States Court of Appeals for the Tenth Circuit, in a cause between Allan Gordon, Appellant, and United States of America, Appellee, No. 4531; and Eli Tempkin, Appellant, and United States of

America, Appellee, No. 4532, wherein the judgments of the said Court of Appeals affirming the judgment and sentence of the district court were duly entered on the 28th day of February, A.D. 1953; as by the inspection of the transcript of the record of the said United States Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was duly submitted:

On consideration whereof, It is ordered and adjudged by this Court that the judgments of the said United States Court of Appeals in this cause be, and the same are hereby vacated.

And it is further ordered, That this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Tenth Circuit for consideration in the light of the Government's confession of error.

June 1, 1953.

You, therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the eighth day of July, in the year of our Lord one thousand nine hundred and fifty-three.

HAROLD B. WILLEY,
Clerk of the Supreme Court of
the United States,
By Hugh W. Barr, Deputy Clerk.

(Endorsed) Supreme Court of the United States, No. 688, October Term, 1952. Allan Gordon and Eli Tempkin vs. United States of America.

Filed U. S. Court of Appeals, Tenth Circuit, July 10, 1953.

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Tenth Circuit:

Order on Reconsideration.

Forty-fifth Day, May Term, Friday, August 7th, 1953. Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Alfred P. Murrah, Circuit Judges.

This cause comes on for consideration in pursuance of the mandate of the Supreme Court of the United States, vacating the judgments herein and remanding the same "for consideration in the light of the Government's confession of error."

In complete obedience to the mandate of the Court, we have earnestly reconsidered the questions in the light of the confession of error, and upon consideration whereof we respectfully adhere to the majority views heretofore expressed.

Judgment will be reentered accordingly.

Judge Huxman dissenting.

It would seem that the question is of sufficient gravity that the case should be set for argument and the Justice Department be given an opportunity to argue the question orally or present its views in a written brief. Only in this way can the intent of the Supreme Court as it manifests itself to me in its mandate be made effective. In any event I adhere to the views expressed in my dissent in Gordon et al v. United States, 203 F.2d 248, and would reverse the judgment and remand the case with directions to grant a new trial.

Judgment (Case No. 4531).

(August 7, 1953.)

Pursuant to the order on reconsideration, it is now here ordered and adjudged by this court that the judgment of the United States District Court for the District of Utah be and the same is hereby affirmed.

It is further ordered by this court that Allan Gordon, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of

the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Judgment (Case No. 4532).

(August 7, 1953.)

Pursuant to the order on reconsideration, it is now here ordered and adjudged by this court that the judgment of the United States District Court for the District of Utah be and the same is hereby affirmed.

It is further ordered by this court that Eli Tempkin, appellant, surrender himself to the custody of the United States Marshal for the District of Utah, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

Clerk's Certificate.

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as full, true, and complete copies of certain record entries and proceedings (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United States Court of Appeals for the Tenth Circuit in certain causes in said United States Court of Appeals, No. 4531, wherein Allan Gordon was appellant and United States of America was appellee, and No. 4532, wherein Eli Tempkin was appellant, and the United States of America was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 18th day of August, A.D. 1953.

(Seal, U. S. Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Court of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 318

ALLAN GORDON and ELI TEMPKIN, Petitioners,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed November 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1952

ALLAN GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

No. .....

ELI TEMPKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Allan Gordon and Eli Tempkin respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in these cases August 7th, 1953.

STATEMENT OF JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1254, (1). On June 1, 1953, this Court granted a

Writ of Certiorari and vacated a judgment of the Court of Appeals Tenth Circuit of February 28, 1953. The case was remanded to the Court of Appeals Tenth Circuit for consideration in light of the Government's confession of error. On August 7, 1953, the Court of Appeals made its order on reconsideration, adhering to the majority views previously expressed by the Court of Appeals in its opinion filed February 28, 1953, the Honorable Walter A. Huxman, Circuit Judge, dissenting. On motion of petitioners the mandates have been stayed for thirty days.

This petition for Writ of Certiorari is filed within thirty days from the entry of judgment herein by the United States Court of Appeals, Tenth Circuit.

OPINIONS BELOW

There was no opinion in the District Court. The majority opinion of the Court of Appeals is reported in 203, F 2d at P. 248 and is printed in the original record[1] at pages 114 to 123 inclusive. The dissenting opinion is reported at 203 F 2d 24 and is printed in the record at pages 123 to 127 inclusive. Pursuant to the mandate of this Court of June 1, 1953, in Case No. 688, the Circuit Court entered its order of reconsideration and reentered the judgment, (R. 3) which order has not yet been officially reported. The Honorable Walter A. Huxman, Circuit Judge, dissented and his opinion (R. 3) has not been officially reported.

STATEMENT OF THE MATTER INVOLVED

The judgment of the Court of Appeals sought to be reviewed, reinstated a previous judgment which affirmed a judgment of the Trial Court convicting the petitioners and others of substantive offenses in violation of Sections 601 and 603 of the Defense Production Act of 1950 (Public Law 774, 81st Congress) and Regulation "W", as amended, promulgated thereunder, and of conspiring to violate the

[1] The record certified on the previous petition for Writ of Certiorari will be referred to herein as the "Original Record," abbreviated "O. R."

provisions of said Defense Production Act.

The Information contained four counts: The First Count charged the petitioners and others' with a wilful acceptance of a down payment in an amount less than a sum equal to 25% of the cash purchase price in the sale of a sewing machine (O.R. 3); the Second Count charged the same persons with a wilful failure to keep and preserve bona fide records showing the amount of the purchaser's down payment in an instalment sale of a sewing machine (O.R. 3 & 4); the Third Count charged the same persons and Turner' with a wilful extension of credit knowing full well that other credit had been extended in connection with the sale, so that the total amount of credit in connection with the sale of a sewing machine was beyond 75% of the cash price of the machine (O.R. 4); the Fourth Count charged the persons named in count 3 with a conspiracy in violation of Section 371, Title 18 U.S.C. (O.R. 4 & 5) The charge was not a general conspiracy, but merely charged a conspiracy to commit an offense against the United States in violation of the sections and regulation above set out, which offense consisted of the defendants knowingly making an instalment sale of a sewing machine designed for household use to one Evelyn Allen and knowingly extending credit in connection with such sale beyond and in excess of 75% of the cash price of said sewing machine. No overt act was alleged. (O.R. 4 & 5)

The trial court instructed the jury as follows:

> "Now, ladies and gentlemen of the jury, there is a proposition of law which I want to call to your attention, and that is that a person can do acts by himself, he can also do acts through agents or employ-

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[1] The Circuit Court reversed the convictions of Deverich and Stone, the other defendants charged, on the ground of insufficient evidence. (R. 117-118, 123)

[2] Turner was given a suspended sentence, placed on probation, and did not appeal. (O.R. 3)

ees; and a person can have knowledge by himself, and he can have knowledge by and through his agents and employees. That is to say, the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer.

"Now that is true, ladies and gentlemen of the jury, only if the agents or employees are engaged in the course of and within the scope of their employment, and only if the knowledge comes to them while they are so engaged, but if they obtain knowledge while they are engaged in the course of the business working for their employer, that kind of knowledge is imputable, — attributable and chargeable to the employer.

"Now if an agent or employee of Mr. Gordon or Mr. Tempkin, as I have said to you, acting within the course of his employment, makes an installment sale of a sewing machine, the act of that agent is the act of the master and of the employer." (O.R. 92-93).

Exception was duly taken to this instruction. (O.R. 101)

The Appellate Court held,

"The effect of this instruction was to hold one partner criminally responsible for the acts of the other and both partners for the acts of their employee salesmen while acting in the course of their employment." (Majority Opinion O.R. 119)

The Court of Appeals further held,

"What the court did in effect was to make wilfulness an essential element of the offenses charged in the information and to charge the employers with the guilty knowledge and acts of the employees in determining the question of wilfulness." (Majority Opinion O.R. 121)

Affirming the judgment, the Court of Appeals held that in determining the question of wilfulness the petitioners were charged with the knowledge of their employees. (O.R. 121) No distinction in this regard was made by the Appel-

late Court between the first three substantive offenses charged and the conspiracy count.

If petitioners are not criminally chargeable with the acts of their employees unless they had knowledge of such acts, then there was not sufficient evidence to sustain a conviction of either of the petitioners herein. The majority opinion stated,

> "Since, as we have seen, there is no direct or positive proof that Eli Tempkin made the Colley sale, we have no need to consider whether as a matter of law his partner Gordon would be criminally responsible for his acts, for the conviction of neither of them can stand on that proof. We have then to consider the very perplexing question whether the partners can be held criminally liable for the knowledge and acts of their agents and employees, who, the evidence shows, while acting in the course of their employment, actually made the sales without having collected the required down payment." (Majority Opinion O.R. 119)

QUESTIONS PRESENTED

1. Whether in a prosecution for wilful violations of consumer credit regulations in the installment sales of sewing machines, the Court erred in instructing the jury that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner-owners of the business.

2. Whether the Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute the employer a co-conspirator when such guilty knowledge was acquired by the employee acting within the scope of his employment.

3. Whether the Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offenses, that there was sufficient evidence to support the verdict of guilty.

REASONS FOR ALLOWANCE OF THE WRIT

1. Each of the questions presented herein embody questions of federal law which have not been, but should be, settled by this court.

2. The decision herein is at variance and in conflict with the decisions of the following circuits:

A. The Third Circuit in Nobile vs. United States, 284 Fed. 253, holding that an employer cannot be held criminally liable for the act of his agent merely because it is in the course of his business and within the scope of his agent's employment.

B. The Sixth Circuit in Lurding vs. United States, 179 F. 2d 419, holding that the doctrine of respondent superior is not to be drawn from the law of negligence and applied to criminal liability.

C. The Seventh Circuit in Paschen vs. United States, 70 F. 2d 491, holding that civilly one is responsible for the acts and doings of his accredited agent acting within the scope of his authority, while one may be criminally liable only in case he intentionally does that which the law denounces and penalizes.

D. The Second Circuit in United States vs. Cohn, 128 Fed. 615, holding that it is a rule in criminal cases that a partner is not charged by the criminal acts of his copartners or of others acting in behalf of the firm, unless he has knowledge thereof.

3. The decision herein sustaining conviction of petitioners under instructions charging that the principals are criminally liable for acts committed by their agents within the scope of their employment without the direction or guilty knowledge of the principals departs from the accepted and usual course of judicial proceedings and is a violation of petitioners' rights under the Fifth Amendment of

the United States Constitution in that they were deprived of their liberty and property without due process of law.

4. The decision herein appears to be in conflict with the following applicable decisions of this Court holding that persons having no knowledge of the conspiracy are not conspirators:

A. United States of America, petitioner, vs. Salvatore Falcone, 311 U. S. 205, 85 L. Ed. 128.

B. Direct Sales Co., petitioner, vs. United States of America, 319 U. S. 703, 87 L. Ed. 1674.

WHEREFORE, the petitioners respectfully pray that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Court of Appeals for the Tenth Circuit commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the proceedings of that Court therein, being the cases numbered and entitled in its docket as Allan Gordon vs. United States of America, No. 4531, Eli Tempkin vs. United States of America, No. 4532, and that the judgment of that Court be reviewed by this Court and for such other and further relief as to this Court may seem proper.

Dated this 3rd day of September, 1953.

ALLAN GORDON
ELI TEMPKIN
Petitioners

JOHN S. BOYDEN
Counsel for Petitioners
Suite 2, 351 So. State Street

Salt Lake City 1, Utah

ALLEN H. TIBBALS
of Counsel

STATUTES INVOLVED

The federal statutes involved are Sections 601 and 603 of the Defense Production Act of 1950 (Public Law 774, 81st Congress) and Regulation "W", as amended, promulgated thereunder, and Section 371, Title 18, United States Code. Pertinent portions of these statutes are quoted in the appendix, infra P. 16 et seq.

STATEMENT OF FACT

The Information

The Information contained four counts, and charged the petitioners, with others, of criminal offenses against the United States. The First Count charged a wilful acceptance of a down payment in an amount less than a sum equal to 25% of the cash purchase price in a sale of a sewing machine to Buean E. Colley. (O.R. 3)

The Second Count charged a wilful failure to keep and preserve bona fide records showing the amount of the purchaser's down payment in an instalment sale of a sewing machine to Buean E. Colley. (O.R. 3, 4)

The Third Count charged a wilful extension of credit, knowing full well that other credit had been extended in connection with the sale, so that the total amount of credit in connection with a sale of a sewing machine to Evelyn Allen was beyond 75% of the cash price of the machine. (O.R. 4)

The Fourth Count charged a conspiracy in violation of Section 371, Title 18, United States Code. This charge was not a general conspiracy, but merely charged a conspiracy to commit an offense against the United States in violation of the section and regulation above set out, "which offense consisted of the defendant knowingly making an instalment sale of a sewing machine designed for household use to one

Evelyn Allen, and knowingly extending credit in connection with sale beyond and in excess of 75% of the cash price of said sewing machine." (O.R. 4 & 5) No overt act was alleged. (O.R. 4 & 5)

The Evidence

Counts One and Two are based upon the sale of a sewing machine to Buean E. Colley. (O.R. 3, 4) Both Mr. and Mrs. Colley frequently referred to a Mr. Tempkin as the salesman who made the sale to them. (O.R. 31, 38) There were two Mr. Tempkins in the organization: one the petitioner Eli Tempkin, and the other Irving Tempkin. (O.R. 73) Although Mr. Eli Tempkin was in the courtroom during the entire trial, no attempt at identification was made by either Mr. or Mrs. Colley. The identification of Mr. Tempkin is solely dependent upon a signature appearing on Exhibit "2", shown at page 109 of the transcript. Whether the first letter is a capital "T" or whether it is an "E" traversed by a "T" is difficult to determine. In commenting upon this evidence, the trial court addressed the prosecuting attorney as follows:

> "Mr. Lowry, in the course of the evidence it was your duty to have your witnesses identify these people and you failed to do it in this respect by any positive and direct evidence." (O.R. 91)

The Circuit Court, in commenting upon the same matter, stated,

> "Since, as we have seen, there is no direct or positive proof that Eli Tempkin made the Colley sale, we have no need to consider whether as a matter of law his partner Gordon could be criminally responsible for his acts, for the conviction of neither of them could stand upon that proof." (O.R. 119)

Counts Three and Four are both based upon a sale of a sewing machine to Evelyn Allen. (O.R. 4-5) Evelyn Allen testified that the salesman who made the sale to her was named Mr. Turner. He was accompanied by another sales-

man whose name she did not know and who was never otherwise identified. (O.R. 42)

Petitioners Allan Gordon and Eli Tempkin at the times laid in the Information were partners doing business under the name of National Stores. (O.R. 17) Over the objection of counsel for the petitioners that certain evidence was not within the scope of the offenses laid in the Information, testimony from many purchasers not mentioned in the four counts of the Information was taken concerning sales wherein a payment of less than 25% down was made. (O.R. 30, 36, 48, 49, 52, 53, 54, 57, 64, 66, 68)

Petitioner Allan Gordon took the stand and testified that he had never had knowledge of the alleged wrongful acts and introduced the records of the company which showed proper down payments, and copies of the contracts of sale signed by the purchasers showing that the lawful down payments had been made. (O.R. 74, 75, 76)

In addition to the testimony of Mr. Gordon that receipts from the Salt Lake Store were put in the Continental Trust and Savings Bank (O.R. 75), defendants' Exhibits "B", and "C", "D", "E" and "F" showed that the down payments in the correct amounts were deposited in the Continental Bank from the transactions in all four counts of the Information; that is, in the cases of Buean E. Colley and Evelyn Allen. (O.R. 106)

The testimony of the purchasers was in conflict with the documentary evidence, but since there was no testimony that Mr. Gordon either directed or acquiesced in the falsification of the records, his testimony was entirely reconcilable with the testimony of the purchasers.

The only witness who ever referred to the appellant Gordon was William C. Romney, who stated that Gordon appeared at the place of business as general manager. He stated that he would be there and talk occasionally. He

stated that they had sales meetings. (O.R. 29) The uncontradicted testimony of Allan Gordon was to the effect that during the year 1951 he came to Salt Lake City two, or not more than three, times. (O.R. 73) Mr. Gordon further testified that by written agreement they required all salesmen to get a deposit with the bookkeeper of 25% of the selling price of the machines. In order to see that this was done, they kept records, bank and interoffice records, book records, everything that goes to make a sale. They had a bank account in the Continental National Bank. (O.R. 74)

ARGUMENT

I.

The Court of Appeals erred in affirming the conviction of the petitioners in a prosecution for wilful violations of consumer credit regulations in the installment sales of sewing machines wherein the jury was instructed that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner-owners of the business.

The Circuit Court, in determining that the employers are charged with guilty knowledge and acts of employees in determining the question of filfulness, erroneously relied upon the Inland Freight Lines vs. U. S., 10th Circuit case, 191 F. 2d 313, wherein the defendant was a corporation. The position of petitioners is adequately stated in the dissenting opinion of Judge Huxman (O.R. 125) wherein it is conceded that the knowledge of the agents of a corporation is the knowledge of the corporation. That is a well established principle of criminal law as applied in the case of a corporation, but is clearly distinguishable from the case at bar.

> "As a separate entity and aside from its agents and employees a corporation can do nothing. It has no conscience, will, or power of thought. It acts only through its agents. Their acts are the only acts

it can commit and their knowledge of necessity is the only knowledge it can have." (O.R. 125).

Judge Huxman is supported by well established authority on this point which he cites in his opinion.[1]

No corporation was involved in the case at bar. In the words of Judge Huxman,

> "The jury was not asked to determine, or was not told, that it was necessary to find that the partners had knowledge or intent that the law was being violated." (O.R. 127)

This decision of the Court is at variance and in conflict with the decisions of other circuits as set forth in No. 2 of our Reasons for Allowance of the Writ.[2]

Petitioners were not only fined $2,500.00 each, but were both sentenced to serve one year in jail with nine months suspended (O.R. 10, 11); this without due process of law. In the words of the dissenting opinion,

> "But while it is important that the guilty be brought to trial and speedily punished, it is even more important to the preservation of our institutions that due process be observed in bringing that about. Due process means that the trial must be conducted according to recognized principles of law and procedure. It requires an impartial trial. It is necessary that only competent evidence be received and that the jury be correctly instructed as to the basic principles of law, guiding it in its deliberations and considerations of the evidence in the case. The partners denied intent to violate the law or any knowledge that their employees were violating it. They were entitled to have their testimony weighed and evaluated under proper instructions by the court together with all other relevant evidence. They were

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[1] Burdick Law of Crime, Sec. 175, 178, 179; Bishop New Criminal Law, Sec. 417; Kunz v. Lowden, 124 F. 2d 911; Haverty Furniture Co. v. Foust, 124 S.W. (2d) 695.

[2] Nobile vs. U. S., 3rd Circuit, 284 Fed. 253; Lurding vs. U. S., 6th Circuit, 179 F. 2d 419; Paschen vs. U.S., 7th Circuit, 70 F. 2d 491; U.S. vs. Cohn, 2nd Circuit, 128 Fed. 615.

entitled to have the jury told that they were not criminally liable for the acts of their employees, although committed within the scope of their employment, unless they directed such activities or had guilty knowledge thereof." (O.R. 124)

In the matter of the previous petition for Writ of Certiorari to this Court, Case No. 688, the Solicitor General of the United States filed a memorandum conceding and admitting this error in instruction by the trial court. He further recommended that the matter be disposed of summarily, granting the Writ, vacating the judgment of the Circuit Court, and remanding the case to the District Court for retrial.

The Honorable Judge Huxman, in dissenting to the order of the Court of Appeals on reconsideration, protests that this matter is of sufficient gravity that additional arguments or briefs should have been required in order that the intent of this Court as expressed in its mandate might be made effective. (O.R. 3) The petitioners are aggrieved because an appeal to the Court of Appeals and two petitions for Writ of Certiorari to this Court with all of the attendant costs have been required to correct an error which the Government concedes, and which error should have been promptly correctly by the trial court when objection was seasonably made.

The instruction of the lower court departed from the accepted and usual course of judicial proceedings so as to constitute a violation of petitioners' rights under the Fifth Amendment of the Constitution of the United States of America, depriving them of their liberty and property without due process of law.

II.

The Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute an employer a co-conspirator when such guilty knowledge was acquired by the employee acting in the scope

of his employment. (Majority Opinion O.R. 121).

The trial court made no distinction between the first three substantive offenses charged in the Information and the conspiracy charged in the Information, when it stated that the agent or employees of the petitioners acting within the course of their employment, the act of the agent is the act of the master and of the employer (O.R. 93). Neither did the Circuit Court, in affirming the decision, make such a distinction when approving the instruction that the employers are charged with the guilty knowledge and acts of the employees in determining the question of wilfulness (O.R. 121). The agents were employed to sell sewing machines, a legitimate business operation. The jurors were instructed that the petitioners were chargeable with the acts of their agents in the selling of sewing machines. The court ignored the principle that a conspirator must have knowledge of the conspiracy. The effect of the decision in this regard appears to be in conflict with the applicable decisions of this Court holding that persons having no knowledge of the conspiracy are not conspirators. United States of America, Petitioner, vs. Salvator Falcone, 311 U. S. 205, 85 L. Ed. 128. This Court in commenting upon the Falcone decision in a later case, Direct Sales Co., Petitioner, vs. United State of America, 319 U. S. 703, 87 L. Ed. 1674; at p. 711 U. S.; and P. 1681 L. Ed. stated that,

> ". . . without the knowledge the intent cannot exist. Furthermore to establish the intent the evidence of knowledge must be clear not equivocal, this, because charges of conspiracy are not to be made out by piling inferences upon inferences, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

The Solicitor General of the United States agrees, in his memorandum filed in connection with our previous petition, with our contention that the conspiracy count in the case must stand or fall on the validity of the general

instruction as discussed under Point I of this argument.[1]

III.

The Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offense, that there was sufficient evidence to support the verdict of guilty.

The Defense Production Act of 1950 includes "wilful violation" as an element of the offense (Appendix 15). Each count of the Information charged wilfulness on the part of the defendants. (O.R. 3, 4) The action of both the trial court and Circuit Court as hereinbefore described, has therefore, interpreted the Defense Production Act as an act wherein the guilty knowledge of the employees may be charged to the employers in determining the question of wilfulness. We do not believe that such was the intent of Congress. Since both the trial court and the Circuit Court assume the petitioners were responsible for the criminal acts of their employees, and that such acts charged guilty knowledge to the employers in determining the question of wilfulness under the statute, the petitioners have never had the sufficiency of the evidence to support the verdict of guilty against them correctly determined in the light of existing law.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

JOHN S. BOYDEN,
Counsel for Petitioners

ALLEN H. TIBBALS
of Counsel

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[1]P. 7, Solicitor's Memorandum, "We therefore agree that the case must stand or fall on the validity of this general instruction."

APPENDIX

TITLE VI — CONTROL OF CONSUMER AND REAL ESTATE CREDIT

Tit. 50, App. U.S.C. 2131

"§ *2131. Power to exercise consumer credit controls*

"To assist in carrying out the objectives of this Act [sections 2061-2166 of this Appendix], the Board of Governors of the Federal Reserve System is authorized, nothwithstanding the provisions of Public Law 386, Eighteth Congress (61 Stat. 921), to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary, but in no event beyond the date on which this section terminates: * * *" Sept. 8, 1950, c. 932, Title VI, Sec. 601, 64 Stat. 812; July 31, 1951, 7:00 P.M. E. D. T., c. 275, Title I, Sec. 106 (a), 65 Stat. 138.

Tit. 50 App. U.S.C. 2133

"§ *2133. Penalties*

"Any person who willfully violates any provision of section 601, 602, or 605 [sections 2131, 2132, or 2135 of this Appendix] or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both. Sept. 8, 1950, c. 932, Title VI, § 603, 64 Stat. 814; July 31, 1951, 7:00 p.m., E. D. T., c. 275, Title I, § 106(b), 65 Stat. 138."

PART 222 — CONSUMER CREDIT

REGULATION W

Sept. 8, 1950, 15 F. R. 6118

"§222.2 *General requirements and registration* —(a) *General requirements.* Each person engaged in the business of making instalment sales or in-

stalment loans, or engaged in the business of lending on the security of or discounting or purchasing obligations arising out of such credit, is referred to in this part as a 'Registrant'; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him or out of any such obligation lent on or discounted or purchased by him, except on the following conditions:

"(1) He must have a license, and each Registrant is hereby granted such a license, but such license of a Registrant may be suspended in the manner and on the grounds stated in § 222.8(b); and

"(2) The credit extended, renewed revised or consolidated by him, or giving rise to the obligation discounted or purchased by him or acquired by him as collateral must comply with the applicable requirements of this part.

• • •

"§ *222.3 Instalment sales; general rules.* • • •

"(*a*) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (c) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

• • •

"(*c*) *Time of down payment.* The down payment shall be obtained at or before the time of delivery of the listed article; except that in the case of an article listed in Group D of § 222.9, the downpayment shall be obtained at or before the time of beginning the agreed-upon repairs, alterations, or improvements.

• • •

"§ *222.6. Certain technical provisions*—• • •

"(*c*) *Record of instalment sale.* The record of an instalment credit arising from the sale of a

listed article and required by § 222.3(b) shall set forth (in any order) the following information:

"(1) A brief description identifying the article purchased;

"(2) The case price of the article;

"(3) The amount of the purchaser's down payment (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stating the monetary value assigned thereto in good faith;

"(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

"(5) The time balance owned by the purchaser, which is the sum of items (2) and (4) minus item (3); and

"(6) The terms of payment.

The record need not include a description of the article if it is purchased by means of a coupon book or similar medium of instalment credit upon which there has been made a cash down payment of at least as great as the highest down payment required by this part on any article sold by the Registrant. The record need not include the information called for by items (2) and (4) if the Registrant is one who, with respect to the article, customarily quotes to the public a time price only which includes the finance or other charges if any, provided he sets forth such time price in such record, and provided he obtains a cash down payment which is at least as large as would be required if the percentage specified for the article in § 222.9 were applicable to the time price. • • •

"§ *222.9 Supplement.*

"*Part 1. Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used, are 'listed articles,' and the following required down payments and

maximum loan values are prescribed (such down payments and loan values to be calculated as specified in Parts 4 and 5 of this section; but such down payment and loan value requirements shall not apply in the case of a listed article having a cash price of less than $50, exclusive of any applicable sales tax:

• • •

"Group B-25 percent minimum down payment, 75 percent maximum loan value:

• • •

"9. Sewing machines designed for household use."

CHAPTER 19 — CONSPIRACY

Tit. 18, U.S.C. 371

"§ 137. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

(Footnote to §371)

"Historical and Revision Notes"

"Reviser's Note. Based on Title 18, U.S.C., 1940 ed., §§ 88,294 (Mar. 4, 1909, c. 321, §37, 35 Stat. 1096 [derived from R.S. §5440]; Mar. 4, 1909, c. 321, § 178a, as added Sept. 27, 1944; c. 425, 58 Stat. 752).

"This section consolidates said sections 88 and 294 of Title 18 U.S.C., 1940 ed. • • •"

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254087—53

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 688

ALLAN GORDON AND ELI TEMPKIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The majority (R. 114–123) and dissenting opinions (R. 123–127) are not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on February 28, 1953 (R. 127–128). The petition for a writ of certiorari was filed on March 30, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a) F. R. Crim. P.

QUESTION PRESENTED

Whether in a prosecution for wilful violations of consumer credit regulations in the installment

sales of sewing machines, the court erred in instructing the jury that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner owners of the business.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 10 *et seq.*

STATEMENT

Petitioners Gordon and Tempkin, together with Deverich, Stone, and Turner, were charged in the United States District Court for the District of Utah with violations of Sections 601 and 603 of the Defense Production Act of 1950 (64 Stat. 798, 812, 814) and Regulation W (51 F. Reg. 6118 as amended 15 F. Reg. 6931) promulgated thereunder (pp. 10–12, *infra*). The first count in the information charged that the two petitioners and Deverich and Stone, on March 21, 1951, made an instalment sale of a sewing machine to Buean E. Colley, and that on the delivery of this machine they unlawfully, knowingly, and wilfully accepted and received a down payment of less than 25 percent of the sale price (R. 3). The second count charged the same persons with unlawfully, knowingly, and wilfully failing to keep records showing the amount of the purchaser's down payment in the instalment sale of the machine to Buean E. Colley (R. 3–4). The third count charged that the two petitioners and Deverich, Stone, and Turner, on May 17, 1951, made an instalment sale of

a sewing machine to Evelyn Allen and extended credit knowing that other credit had been extended therewith, so that the total amount of credit in connection with the sale exceeded 75 percent of the sale price (R. 4). The fourth count charged that the persons mentioned in count three conspired to violate Sections 601 and 603 of the Act and Regulation W by making the sale of the machine to Evelyn Allen as alleged in count three (R. 4–5).

The jury found all the defendants guilty as charged (R. 8). Petitioners were given concurrent sentences of imprisonment for one year and a $2,500 fine on each of the four counts, with nine months of the jail sentence suspended, and the fines suspended on all but one of the four counts (R. 10–11). On appeal (R. 13–14) their convictions were affirmed by a divided court (R. 127–128).[1]

The evidence may be summarized briefly as follows:

Petitioners Gordon and Tempkin were engaged in the business of selling new and used sewing machines as a partnership under the name of National Stores, first in Los Angeles and later in Salt Lake City, Utah, where the sales laid in the information were made (R. 17, 32, 79–80).

[1] The court below reversed the convictions of Deverich and Stone on the ground of insufficient evidence (R. 117–118, 123). Turner was given a suspended sentence, placed on probation, and did not appeal (R. 9).

An intensive newspaper and radio advertising campaign for low priced re-built sewing machines to be purchased on time stimulated sales. In most instances new and more expensive machines instead of the re-built models were sold, thereby increasing the salesmen's commissions. One salesman testified that he made about 50 sales, in about 80 percent of which he took "I. O. U.'s" for down payments; that these were turned into the company office and treated as cash as far as the company was concerned; and that he was paid the full amount of his commissions irrespective of the down payments. He testified that the management told the salesmen to procure the required 25 percent down payment, but to accept an "I. O. U." for it if they could not get it otherwise. (R. 29–30, 86, 87.)

Regarding the Colley sale forming the basis for counts one and two, one Tempkin made the sale at the company store. Colley paid $1.00 to hold the machine until his next payday when he brought in an additional $15.00 before taking the machine away. A Mr. Tempkin, in the presence of Mrs. Colley, signed on the date of the sale the conditional sale contract, showing the price as $152.95 with a stated down payment of $38.95, but the signature on the contract was obliterated. The receipt for the original $1.00 bore a signature "E. Tempkin." Colley later made additional payments of $4.00 and $3.00 on the down pay-

ment to a female employee at the store, $23.00 being the total amount paid on the stated down payment of $38.95 (R. 31–38, 72, 103–104, 109). There were two Tempkins connected with the organization, the petitioner Eli and an Irving Tempkin (R. 73). The Government's evidence did not identify which of the Tempkins made this sale.

In the Allen sale forming the basis of counts three and four, the salesman Turner made the sale after bringing the machine to the purchaser's house. The conditional sale contract showed the price of $152.95 including tax, with a down payment of $38.95. The purchaser paid only $13.00 of this stated down payment, signed three "I. O. U.'s" for $6.50 each, and on subsequent dates mailed in envelopes addressed to the company, with the salesman's name on the inside, three money orders for $6.50 each. The obligation for the balance of the down payment was to the salesman alone. (R. 41–45, 70, 104.)

There was also evidence as to numerous other instalment sales of sewing machines to persons other than those named in the information, where less than the required 25 percent down payment was made at the time of the purchases (R. 46, 51, 52, 54–55, 56, 57, 64–65, 66, 68–69, 104, 105, 106).

Petitioner Gordon was the general manager, and gave talks at sales meetings at the Salt Lake City store. He resided in Los Angeles and vis-

ited the Salt Lake City store two or three times during 1951. (R. 29, 73.) Gordon identified company records showing proper down payments by purchasers, and the deposits of these in a Salt Lake City bank (R. 74–76, 106–107). Gordon denied instructing any company employees that they could waive the down payment required by Regulation W, and testified that he had no knowledge of any transactions where less than the down payment was required, until the time of a hearing before the Federal Reserve Board about such discrepancies (R. 78–79, 82). Gordon admitted that at the end of that hearing he stated: "Everything that isn't right has been discontinued" (R. 85).

DISCUSSION

All three judges in the court below agreed that, in the words of the dissenting judge, the "evidence is sufficient to sustain a conclusion that the partners had reason to know that the regulations were being violated by their employees" (R. 123–124). The basis of the dissent below and petitioners' principal contention in this Court is that the case was not submitted to the jury under proper instructions. This argument stems from the judge's charge that "the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer," if the knowledge of the agent was obtained while engaged in the business of the employer in the scope of his employment (R. 92–

93).[2] In the words of the majority below, "[w]hat the court did in effect was to make wilfulness an essential element of the offenses charged in the information, and to charge the employers [petitioners] with the guilty knowledge and acts of the employees in determining the question of wilfulness" (R. 121).

This is admittedly the standard applied in determining the criminal liability of corporations, even where, as here "wilfulness" is an element of the offense. *C. I. T. Corp.* v. *United States,* 150 F. 2d 85, 89–90 (C. A. 9). It has not hitherto been applied to noncorporate owners where intent is an element of the crime.

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[2] Petitioners' other contentions are merely restatements of the same basic contention. They argue that, under the charge, a conviction for conspiracy was possible without proof that they had knowledge of the conspiracy (Pet. 13–14.) However, the court, after describing the offense of conspiracy (R. 95–96), stated:

"* * * that is a question * * * which the court submits to you for your determination under count 4, whether or not, as the court has defined the word 'conspire' to you, from all the facts and circumstances in this case you find that there was an agreement, or an understanding, or a scheme to violate the law of the United States; * * *"

Nevertheless, since the general instruction as to imputing knowledge preceded the discussion of the specific counts, it is possible that the jury could have thought that, under the instructions, the same general rule applied to all counts. We therefore agree that the case must stand or fall on the validity of this general instruction.

Similarly petitioners' attack on the sufficiency of the evidence (Pet. 14) is merely upon the use of the standard set forth in the charge as quoted above.

A corporation can act only through agents, and a corporation as such cannot go to jail. Insofar as individual liability is concerned, it is a general principle of criminal law that guilt is personal. Hence the rule laid down by the decided cases is that a master or employer is not criminally responsible for the acts of his agent or employee which he did not authorize, counsel, advise, approve, or ratify. *Lurding* v. *United States,* 179 F. 2d 419, 421 (C. A. 6); *Paschen* v. *United States,* 70 F. 2d 491, 503 (C. A. 7); *Nobile* v. *United States,* 284 Fed. 253 (C. A. 3); *United States* v. *Cohn,* 128 Fed. 615 (S. D. N. Y.); Sayre, *Criminal Responsibility for the Acts of Another,* 43 Harv. L. Rev. 689.

There is a well-recognized exception to this rule for certain types of welfare legislation as to which intent is not an element of the offense. *United States* v. *Dotterweich,* 320 U. S. 277, 281; *United States* v. *Behrman,* 258 U. S. 280. Consumers' credit controls, such as are involved in the instant case, might well have fallen in this category if Congress had not limited the penal provision, which imposed sentences up to imprisonment for one year, to persons who "wilfully" violate. This requirement of wilfulness seems plainly to manifest a congressional intention that individual violators of the statute should not be punished in the absence of criminal intent. There is no doubt that "wilfully" as used in this type of statute means no more than that the act constituting the

violation must be knowingly and intentionally performed. *Cf. Zimberg* v. *United States,* 142 F. 2d 132, 137 (C. A. 1), certiorari denied, 323 U. S. 712. See also *Browder* v. *United States,* 312 U. S. 335, 341. But while the word implies no evil motive, it does imply a *mens rea* which is essentially personal and individual. We therefore believe that it was error for the court below to affirm the conviction of petitioners on a charge which did not require that they have the intention to violate the law as described above.

CONCLUSION

There was ample evidence of petitioners' guilt. Since the charge to the jury was, in the opinion of both petitioners and respondent, improper for the reasons stated, the case may appropriately be disposed of summarily. The petition for certiorari should be granted and, if the Court agrees with these views, the judgment of the Court of Appeals vacated and the case remanded to the District Court for retrial.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

MAY 1953.

APPENDIX

Statutes and Regulations Involved

The Defense Production Act of 1950, 64 Stat. 798, 812, 814, provides:

> Sec. 601. To assist in carrying out the objectives of this Act, the Board of Governors of the Federal Reserve is authorized * * * to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary * * *.
>
> * * * * * *
>
> Sec. 603. Any person who willfully violates any provision of section 601 or 602 or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Part 222—Consumer Regulation W, September 8, 1950, 15 F. Reg. 6118, as amended October 16, 1950, 15 F. Reg. 6931, provides:

> § 222.2 *General requirements and registration—*
>
> (a) *General requirements.* Each person engaged in the business of making instalment sales * * * is referred to in this part as a "Registrant"; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him * * * except on the following conditions:

(1) He must have a license, and each Registrant is hereby granted such a license * * *.

(2) The credit extended * * * must comply with the applicable requirements of this part.

* * * * *

§ 222.3 *Instalment sales; general rules* * * *

(a) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (c) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

(b) *Amounts and intervals of instalments; record.* * * * The information specified in § 222.6 (c) shall be set forth in a bona fide record of any transaction subject to this section.

(c) *Time of down payment.* The down payment shall be obtained at or before the time of delivery of the listed article * * *.

§ 222.6 *Certain technical provisions.* * * *

* * * * *

(c) *Record of instalment sale.* The record of an instalment credit arising from the sale of a listed article and required by § 222.3 (b) shall set forth (in any order) the following information:

(1) A brief description identifying the article purchased;

(2) The cash price of the article;

(3) The amount of the purchaser's down payment (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stating

the monetary value assigned thereto in good faith;

(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

(5) The time balance owed by the purchaser, which is the sum of items (2) and (4) minus item (3); and

(6) The terms of payment.

* * * * *

(i) *Side loan to make down payment.* A Registrant shall not extend any credit for financing the purchase of any listed article if he knows or has reason to know that there is, or that there is to be, any other credit of any kind extended in connection with the purchase of the listed article which would bring the total amount of credit extended in connection with such purchase beyond the amount of instalment credit permitted by this part; but, if the Registrant accepts in good faith a written statement signed by the obligor that no such other credit exists or is to be extended, such statement shall be deemed to be correct for the purposes of the Registrant.

§ 222.9 *Supplement.*

Part 1. *Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used are "listed articles", and the following required down payments and maximum loan values are prescribed * * *

Group B—25 percent minimum down payment, 75 percent maximum loan value:

* * * * *

9. Sewing machines designed for household use.

U. S. GOVERNMENT PRINTING OFFICE: 1968

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In The

Supreme Court of the United States

OCTOBER TERM, 1953

No. 318

ALLAN GORDON AND ELI TEMPKIN, PETITIONERS,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The majority opinion of the Court of Appeals (O.R.[1] 114-123) is reported at 203 F. 2d 248. The dissenting opinion (O.R. 123-127) is reported in 203 F. 2d at 254. The order on reconsideration, made pursuant to the mandate of this Court (R. 1-2) has not been officially reported, but appears at page 3 of the Transcript of Record. The dissenting opinion to the order appears on the same page.

JURISDICTION

The judgments of the Court of Appeals were entered February 28, 1953 (O.R. 127-128). June 1, 1953, this Court vacated the judgments and remanded the cause to the Court

[1] In the Order Allowing Certiorari filed November 9th, 1953, it was ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to the Writ. For purposes of clarity we therefore will use the symbol O. R. in referring to the pages of said original transcript.

of Appeals "for consideration in the light of the Government's confession of error" (R. 2). August 7, 1953, the Court of Appeals, upon reconsideration, reentered the judgments (R. 3-4). A second petition for a writ of certiorari was filed on September 4, 1953, and was granted on November 9, 1953 (R. 5). The jurisdiction of this Court is invoked under Title 28, U. S. C. 1254 (1). See, also, Rules 37 (b)(2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether in a prosecution for wilful violations of consumer credit regulations in the installment sales of sewing machines, the Court erred in instructing the jury that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner-owners of the business.

2. Whether the Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute the employer a co-conspirator when such guilty knowledge was acquired by the employee acting within the scope of his employment.

3. Whether the Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offenses, that there was sufficient evidence to support the verdict of guilty.

STATUTES INVOLVED

The federal statutes involved are Sections 601 and 603 of the Defense Production Act of 1950 (Public Law 774, 81st Congress) and Regulation "W", as amended, promulgated thereunder, and Section 371, Title 18, United States Code. Pertinent portions of these statutes are quoted in the appendix, infra P. 16 et seq.

STATEMENT

The judgment of the Court of Appeals sought to be reviewed, reinstated a previous judgment which affirmed, as to the petitioners a judgment of the Trial Court convicting the petitioners and others of substantive offenses in violation of Sections 601 and 603 of the Defense Production Act of 1950 (Public Law 774, 81st Congress) and Regulation "W", as amended, promulgated thereunder, and of conspiring to violate the provisions of said Defense Production Act.

The Information

The Information contained four counts, and charged the petitioners, with others, of criminal offenses against the United States. The First Count charged a wilful acceptance of a down payment in an amount less than a sum equal to 25% of the cash purchase price in a sale of a sewing machine to Buean E. Colley. (O.R. 3)

The Second Count charged a wilful failure to keep and preserve bona fide records showing the amount of the purchaser's down payment in an instalment sale of a sewing machine to Buean E. Colley. (O.R. 3, 4)

The Third Count charged a wilful extension of credit, knowing full well that other credit had been extended in connection with the sale, so that the total amount of credit in connection with a sale of a sewing machine to Evelyn Allen was beyond 75% of the cash price of the machine. (O.R. 4)

The Fourth Count charged a conspiracy in violation of Section 371, Title 18, United States Code. This charge was not a general conspiracy, but merely charged a conspiracy to commit an offense against the United States in violation of the section and regulation above set out, "which offense consisted of the defendant knowingly making an instalment

sale of a sewing machine designed for household use to one Evelyn Allen, and knowingly extending credit in connection with such sale beyond and in excess of 75% of the cash price of said sewing machine." (O.R. 4 & 5) No overt act was alleged. (O.R. 4 & 5)

The Evidence

Counts One and Two are based upon the sale of a sewing machine to Buean E. Colley. (O.R. 3, 4) Both Mr. and Mrs. Colley frequently referred to a Mr. Tempkin as the salesman who made the sale to them. (O.R. 31, 38) There were two Mr. Tempkins in the organization: one the petitioner Eli Tempkin, and the other Irving Tempkin. (O.R. 73) Although Mr. Eli Tempkin was in the courtroom during the entire trial, no attempt at identification was made by either Mr. or Mrs. Colley. The identification of Mr. Tempkin is solely dependent upon a signature appearing on Exhibit "2", shown at page 109 of the original transcript. Whether the first letter is a capital "T" or whether it is an "E" traversed by a "T" is difficult to determine. In commenting upon this evidence, the trial court addressed the prosecuting attorney as follows:

> "Mr. Lowry, in the course of the evidence it was your duty to have your witness identify these people and you failed to do it in this respect by any positive and direct evidence." (O.R. 91)

The Court of Appeals, in commenting upon the same matter, stated,

> "Since, as we have seen, there is no direct or positive proof that Eli Tempkin made the Colley sale, we have no need to consider whether as a matter of law his partner Gordon could be criminally responsible for his acts, for the conviction of neither of them could stand upon that proof." (O.R. 119)

Counts Three and Four are both based upon a sale of a sewing machine to Evelyn Allen. (O.R. 4-5) Evelyn Allen

testified that the salesman who made the sale to her was named Mr. Turner. He was accompanied by another salesman whose name she did not know and who was never otherwise identified (O.R. 42)

Petitioners Allan Gordon and Eli Tempkin at the times laid in the Information were partners doing business under the name of National Stores. (O.R. 17) Over the objection of counsel for the petitioners that certain evidence was not within the scope of the offenses laid in the Information, testimony from many purchasers not mentioned in the four counts of the Information was taken concerning sales wherein a payment of less than 25% down was made. (O.R. 30, 36, 48, 49, 52, 53, 54, 57, 64, 66, 68)

Petitioner Allan Gordon took the stand and testified that he had never had knowledge of the alleged wrongful acts and introduced the records of the company which showed proper down payments, and copies of the contracts of sale signed by the purchasers showing that the lawful down payments had been made. (O.R. 74, 75, 76)

In addition to the testimony of Mr. Gordon that receipts from the Salt Lake Store were put in the Continental Trust and Savings Bank (O.R. 75), defendants' Exhibits "B", and "C", "D", "E" and "F" showed that the down payments in the correct amounts were deposited in the Continental Bank from the transactions in all four counts of the Information; that is, in the cases of Buean E. Colley and Evelyn Allen. (O.R. 106)

The testimony of the purchasers was in conflict with the documentary evidence, but since there was no testimony that Mr. Gordon either directed or acquiesced in the falsification of the records, his testimony was entirely reconcilable with the testimony of the purchasers.

The only witness who ever referred to the appellant Gordon was a salesman of National Stores, William C.

Romney, who stated that Gordon appeared at the place of business as general manager. He stated that he would be there and talk occasionally. He stated that they had sales meetings. (O.R. 29) The uncontradicted testimony of Allan Gordon was to the effect that during the year 1951 he came to Salt Lake City two, or not more than three, times. (O.R. 73) Mr. Gordon further testified that by written agreement they required all salesmen to get a deposit with the bookkeeper of 25% of the selling price of the machines. In order to see that this was done, they kept records, bank and interoffice records, book records, everything that goes to make a sale. They had a bank account in the Continental National Bank. (O.R. 74)

On the 17th day of May, 1952, petitioners were found guilty on all four counts of the Information. (O.R. 7, 8) On June 27, 1952, the Court imposed sentence upon Allan Gordon of one year in the Salt Lake County Jail and a fine of $2500.00 on each of the four counts of the Information, the sentences to run concurrently, but suspended nine months of the jail sentence and the fine of $2500.00 on each of three of the counts, thus making the ultimate sentence imposed $2500.00 and a jail sentence of three months. (O.R. 8, 9) A like sentence was imposed upon Eli Tempkin. (O.R. 8 & 9) The Court of Appeals for the Tenth Circuit sustained the conviction. (203 F. 2d 248) Petitioners previously presented to this Court a petition for writ of certiorari. The Solicitor General for the United States filed a memorandum in Case No. 688, October Term 1952 of this Honorable Court, confessing error. Whereupon this Court granted the writ of certiorari and issued a mandate returning the cause to the Court of Appeals for reconsideration in light of the admission. (R. 2) Thereafter, the Court of Appeals reentered the judgments in adherence to the majority views expressed in the original opinion, with the Hon. Walter A. Huxman, Circuit Judge, dissenting. (R. 3) The present petition for writ of certiorari was filed

by petitioners September 4, 1953. The writ was granted November 9, 1953. (R. 5)

SPECIFICATION OF ERRORS

I.

The Court of Appeals erred in affirming the conviction of the petitioners in a prosecution for wilful violations of consumer credit regulations in the installment sales of sewing machines wherein the jury was instructed that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner-owners of the business.

II.

The Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute an employer a co-conspirator when such guilty knowledge was acquired by the employee acting in the scope of his employment.

III.

The Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offense, that there was sufficient evidence to support the verdict of guilty.

SUMMARY OF ARGUMENT

I.

The instructions under which the guilt or innocence of the petitioners was submitted by the trial court to the jury for determination were erroneous in charging that, "the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer." (O.R. 92, 93) The rule laid down by the decided cases is that a master or employer is not criminally responsible for the acts of his agent or employee which he did not authorize, counsel, advise,

approve, or ratify. Lurding v. United States, 179 F 2d 419, 421 (C. A. 6); Paschen v. United States, 70 F 2d 491, 503 (C. A. 7); Nobile v. United States, 284 Fed. 253 (C. A. 3). United States v. Cohn, 128 Fed. 615 (S. D. N. Y.); It was manifestly not the intention of Congress that Consumers credit controls involved in this case should be within the category of welfare legislation in which an intent is not an element of the offense, for the enactment specifically penalizes only "wilfull violations." 50 App. USC 2133 (infra 16). Thus a mens rea which is essentially personal and individual is recognized as an element of the offense. Under the instructions of the court this element of the offense was eliminated from consideration in securing the conviction of petitioners. In applying the principles of criminal law relating to corporations as set forth in the Inland Freight Lines vs. United States, case, 191 F 2d 313, to the case at bar in order to sustain the trial courts erroneous instruction the Court of Appeals in turn erred. The result is a departure from the accepted and usual course of judicial proceedings so as to constitute a violation of petitioners' rights under the Fifth amendment of the Constitution of the United States of America, depriving them of their liberty and property without due process of law.

II.

The effect of the trial court's instructions as affirmed by the court of appeals is to hold that personal knowledge of a conspiracy is not an element of a conspiracy charged under 18 U. S. C. 371. This is in direct conflict with previous decisions of this court holding that persons having no knowledge of the conspiracy are not conspirators. United States vs. Salvator Falcone, 311 U. S. 205, 85 L. Ed. 128; Direct Sales Co. vs. United States, 319 U. S. 703, 87 L. Ed. 1674.

III.

Both the trial court and the Court of Appeals admitted the insufficiency of the evidence to sustain a conviction of

petitioners in the absence of responsibility for the criminal acts of their employees. (O.R. 91, 118, 119) By instructing the jury that the petitioners were responsible for the criminal acts of their employees the trial court deprived the petitioners of the right to have the sufficiency of the evidence to support the verdict of guilty against them determined. By affirmance of the trial court's action the Court of Appeals also erred, and the petitioners have never had the sufficiency of the evidence against them correctly determined in the light of the existing law.

ARGUMENT

I.

The Court of Appeals erred in affirming the conviction of the petitioners in a prosecution for wilful violations of consumer credit regulations in the installment sales of sewing machines wherein the jury was instructed that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner-owners of the business. (O.R. 92, 93, 119)

The Court of Appeals, in holding that the employers are charged with guilty knowledge and acts of employees in determining the question of wilfulness, erroneously relied upon the Inland Freight Lines vs. U. S., 10th Circuit case, 191 F. 2d 313, wherein the defendant was a corporation. The position of petitioners is adequately stated in the dissenting opinion of Judge Huxman (O.R. 125) wherein it is conceded that the knowledge of the agents of a corporation is the knowledge of the corporation. That is a well established principle of criminal law as applied in the case of a corporation, but is clearly distinguishable from the case at bar.

> "As a separate entity and aside from its agents and employees a corporation can do nothing. It has no conscience, will, or power of thought. It acts only through its agents. Their acts are the only acts

it can commit and their knowledge of necessity is the only knowledge it can have." (O.R. 125).

Judge Huxman is supported by well established authority on this point which he cites in his opinion.[1]

No corporation was involved in the case at bar. In the words of Judge Huxman,

> "The jury was not asked to determine, or was not told, that it was necessary to find that the partners had knowledge or intent that the law was being violated." (O.R. 127)

The law requiring knowledge of the employer in order to hold him criminally responsible for the acts of his employees has been recognized in several Circuits.

A. The Third Circuit in Nobile vs. United States, 284 Fed. 253, held that an employer cannot be held criminally liable for the act of his agent merely because it is in the course of his business and within the scope of his agent's employment.

B. The Sixth Circuit in Lurding vs. United States, 179 F. 2d 419, held that the doctrine of respondeat superior is not to be drawn from the law of negligence and applied to criminal liability.

C. The Seventh Circuit in Paschen vs. United States, 70 F. 2d 491, held that civilly one is responsible for the acts and doings of his accredited agent acting within the scope of his authority, while one may be criminally liable only in case he intentionally does that which the law denounces and penalizes.

D. The Second Circuit in United States vs. Cohn, 128 Fed. 615, held that it is a rule in criminal cases that a partner is not charged by the criminal acts

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[1] Burdick Law of Crime, Sec. 175, 178, 179; Bishop New Criminal Law, Sec. 417; Kunz v. Lowden, 124 F. 2d 911; Harvey Furniture Co. v. Foust, 124 S.W. (2d) 695.

of his copartners or of others acting in behalf of the firm, unless he has knowledge thereof.

Petitioners were not only fined $2,500.00 each, but were both sentenced to serve one year in jail with nine months suspended (O.R. 10, 11); this without due process of law. In the words of the dissenting opinion, in the court below,

> "But while it is important that the guilty be brought to trial and speedily punished, it is even more important to the preservation of our institutions that due process be observed in bringing that about. Due process means that the trial must be conducted according to recognized principles of law and procedure. It requires an impartial trial. It is necessary that only competent evidence be received and that the jury be correctly instructed as to the basic principles of law, guiding it in its deliberations and considerations of the evidence in the case. The partners denied intent to violate the law or any knowledge that their employees were violating it. They were entitled to have their testimony weighed and evaluated under proper instructions by the court together with all other relevant evidence. They were entitled to have the jury told that they were not criminally liable for the acts of their employees, although committed within the scope of their employment, unless they directed such activities or had guilty knowledge thereof." (O.R. 124)

In the matter of the previous petition for Writ of Certiorari to this Court, Case No. 688, the Solicitor General of the United States filed a memorandum conceding and admitting this error in instruction by the trial court. He further recommended that the matter be disposed of summarily, granting the Writ, vacating the judgment of the Court of Appeals, and remanding the case to the District Court for retrial.

The Honorable Judge Huxman, in dissenting to the order of the Court of Appeals on reconsideration, protests

that this matter is of sufficient gravity that additional arguments or briefs should have been required in order that the intent of this Court as expressed in its mandate might be made effective. (O.R. 3) The instruction of the lower court departed from the accepted and usual course of judicial proceedings so as to constitute a violation of petitioners' rights under the Fifth Amendment of the Constitution of the United States of America, depriving them of their liberty and property without due process of law.

The petitioners are aggrieved because an appeal to the Court of Appeals and two petitions for Writ of Certiorari to this Court with all of the attendant costs have been required to correct an error which the Government concedes, and which error should have been promptly corrected by the trial court when objection was seasonably made.

II.

The Court of Appeals erred when in effect it held that in a conspiracy guilty knowledge of an employee will constitute an employer a co-conspirator when such guilty knowledge was acquired by the employee acting in the scope of his employment. (Majority Opinion O.R. 121).

The trial court made no distinction between the first three substantive offenses charged in the Information and the conspiracy charged in the Information, when it stated that the agent or employees of the petitioners acting within the course of their employment, the act of the agent is the act of the master and of the employer (O.R. 93). Neither did the Court of Appeals, in affirming the decision, make such a distinction when approving the instruction that the employers are charged with the guilty knowledge and acts of the employees in determining the question of wilfulness (O.R. 121). The agents were employed to sell sewing machines, a legitimate business operation. The jurors were instructed that the petitioners were chargeable with the

acts of their agents in the selling of sewing machines. The court ignored the principle that a conspirator must have knowledge of the conspiracy. The decision in this regard is contrary to the decision of this Court holding that persons having no knowledge of the conspiracy are not conspirators. United States of America, Petitioner vs. Salvator Falcone, 311 U. S. 205, 85 L. Ed. 128. This Court in commenting upon the Falcone decision in a later case, Direct Sales Co., Petitioner, vs. United States of America, 319 U. S. 703, 87 L. E. 1674; at p. 711 U. S.; and P. 1681 L. Ed. stated that,

> ". . . without the knowledge the intent cannot exist. Furthermore to establish the intent the evidence of knowledge must be clear not equivocal, this, because charges of conspiracy are not to be made out by piling inferences upon inferences, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

The Solicitor General of the United States agrees, in his memorandum filed in connection with our previous petition, with our contention that the conspiracy count in the case must stand or fall on the validity of the general instruction as discussed under Point I of this argument.[1]

III.

The Court of Appeals erred in holding, under the statutes and regulations as they existed at the time of the commission of the offense, that there was sufficient evidence to support the verdict of guilty. (O.R. 121, 122)

The Defense Production Act of 1950 includes "wilful violation" as an element of the offense (Appendix 16). Each count of the Information charged wilfulness on the part of the defendants. (O.R. 3, 4) The action of both the trial court and Court of Appeals as hereinbefore described,

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[1] P. 7, Solicitor's Memorandum, "We therefore agree that the case must stand or fall on the validity of this general instruction."

has interpreted the Defense Production Act as an act wherein the guilty knowledge of the employees may be charged to the employers in determining the question of wilfulness. We do not believe that such was the intent of Congress. Since both the trial court and the Court of Appeals assume the petitioners were responsible for the criminal acts of their employees, and that such acts charged guilty knowledge to the employers in determining the question of wilfulness under the statute, the petitioners have never had the sufficiency of the evidence to support the verdict of guilty against them correctly determined in the light of existing law.

If all evidence not properly connected with petitioners were eliminated there are no facts upon which a jury could determine that Mr. Gordon had knowledge of the acts of his employees. Although Mr. Tempkin was in Salt Lake City during the time the alleged acts were committed, the evidence against him is extremely flimsy. We respectfully again call the Court's attention to the state of that evidence as previously set out herein at pages 4, 5 and 6. (O.R. 29-92)

A verdict of guilty under the charges as set forth in the information, even with proper instructions from the court, would require unwarranted presumptions not justified in law. The petitioners having been required to travel this long and tortuous route to secure simple justice have been once placed in jeopardy. Since the evidence would not justify a conviction under proper instructions the government has had its day in court.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

JOHN S. BOYDEN,
Counsel for Petitioners.

ALLEN H. TIBBALS,
of Counsel

Dated December 18th, 1953.

APPENDIX

TITLE VI—CONTROL OF CONSUMER AND REAL ESTATE CREDIT

Tit. 50, App. U.S.C. 2131

"§ *2131. Power to exercise consumer credit controls*

"To assist in carrying out the objectives of this Act [sections 2061-2166 of this Appendix], the Board of Governors of the Federal Reserve System is authorized, notwithstanding the provisions of Public Law 386, Eighteith Congress (61 Stat. 921), to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary, but in no event beyond the date on which this section terminates: • • •" Sept. 8, 1950, c. 932, Title VI, Sec. 601, 64 Stat. 812; July 31, 1951, 7:00 P.M. E. D. T., c. 275, Title I, Sec. 106 (a), 65 Stat. 138.

Tit. 50 App. U.S.C. 2133

"§ *2133. Penalties*

"Any person who willfully violates any provision of section 601, 602, or 605 [sections 2131, 2132, or 2135 of this Appendix] or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both. Sep. 8, 1950, c. 932, Title VI, § 603, 64 Stat. 814; July 31, 1951, 7:00 p.m., E. D. T., c. 275, Title I, § 106(b), 65 Stat. 138."

PART 222—CONSUMER CREDIT

REGULATION W

Sept. 8, 1950, 15 F. R. 6118

"§ *222.2 General requirements and registration* —(*a*) *General requirements.* Each person engaged in the business of making instalment sales or in-

stalment loans, or engaged in the business of lending on the security of or discounting or purchasing obligations arising out of such credit, is referred to in this part as a 'Registrant'; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him or out of any such obligation lent on or discounted or purchased by him, except on the following conditions:

"(1) He must have a license, and each Registrant is hereby granted such a license, but such license of a Registrant may be suspended in the manner and on the grounds stated in § 222.8(b); and

"(2) The credit extended, renewed revised or consolidated by him, or giving rise to the obligation discounted or purchased by him or acquired by him as collateral must comply with the applicable requirements of this part.

• • •

"§ *222.3 Instalment sales; general rules.* • • •

"(*a*) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (c) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

• • •

"(*c*) *Time of down payment.* The down payment shall be obtained at or before the time of delivery of the listed article; except that in the case of an article listed in Group D of § 222.9, the down payment shall be obtained at or before the time of beginning the agreed-upon repairs, alterations, or improvements.

• • •

"§ *222.6 Certain technical provisions* — • • •

"(*c*) *Record of instalment sale.* The record of an instalment credit arising from the sale of a

listed article and required by § 222.3(b) shall set forth (in any order) the following information:

"(1) A brief description identifying the article purchased;

"(2) The case price of the article;

"(3) The amount of the purchaser's down pament (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stating the monetary value assigned thereto in good faith;

"(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

"(5) The time balance owned by the purchaser, which is the sum of items (2) and (4) minus item (3); and

"(6) The terms of payment.

The record need not include a description of the article if it is purchased by means of a coupon book or similar medium of instalment credit upon which there has been made a cash down payment of at least as great as the highest down payment required by this part on any article sold by the Registrant. The record need not include the information called for by items (2) and (4) if the Registrant is one who, with respect to the article, customarily quotes to the public a time price only which includes the finance or other charges if any, provided he sets forth such time price in such record, and provided he obtains a cash down payment which is at least as large as would be required if the percentage specified for the article in § 222.9 were applicable to the time price. • • •

"§ *222.9 Supplement.*

"*Part 1. Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used, are 'listed articles,' and the following required down payments and

maximum loan values are prescribed (such down payments and loan values to be calculated as specified in Parts 4 and 5 of this section; but such down payment and loan value requirements shall not apply in the case of a listed article having a cash price of less than $50, exclusive of any applicable sales tax:

• • •

"Group B-25 percent minimum down payment, 75 percent maximum loan value:

• • •

"9. Sewing machines designed for household use."

CHAPTER 19 — CONSPIRACY

Tit. 18, U.S.C. 371

"§ *137. Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

(Footnote to § 371)

"Historical and Revision Notes"

"Reviser's Note. Based on Title 18, U.S.C., 1940 ed., §§ 88,294 (Mar. 4, 1909, c. 321, §37, 35 Stat. 1096 [derived from R.S. §5440]; Mar. 4, 1909, c. 321, § 178a, as added Sept. 27, 1944; c. 425, 58 Stat. 752).

"This section consolidates said sections 88 and 294 of Title 18 U.S.C., 1940 ed. • • •"

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 318

ALLAN GORDON AND ELI TEMPKIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the Court of Appeals (R. I. 114–127)[1] is reported at 203 F. 2d 248. The order of the Court of Appeals on reconsideration (R. 3) is not reported.

JURISDICTION

The judgments of the Court of Appeals on reconsideration were entered on August 7, 1953 (R. 3, 4). The petition for a writ of certiorari, filed on September 4, 1953, was granted on November 9, 1953 (R. 5). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

[1] The record in No. 688, O. T. 1952, is designated "R. I."

QUESTION PRESENTED

Whether, in a prosecution for wilful violations of consumer credit regulations in the instalment sales of sewing machines, the trial court erred in instructing the jury that guilty knowledge of petitioners' employees obtained during the sale of such machines could be imputed to petitioners, the partner owners of the business.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 24–26.

STATEMENT

Petitioners Gordon and Tempkin, together with Deverich, Stone, and Turner, were charged in the United States District Court for the District of Utah with violations of Sections 601 and 603 of the Defense Production Act of 1950 (64 Stat. 798, 812, 814) and Regulation W (51 F. Reg. 6118, as amended, 15 F. Reg. 6931) promulgated thereunder (*infra*, pp. 24–26)[2]. The first count in the information charged that the two petitioners and Deverich and Stone, on March 21, 1951, made an instalment sale of a sewing machine to Buean E. Colley, and that on the delivery of this machine they unlawfully, knowingly, and wilfully accepted and received a down payment of less than 25 percent of the sale price (R. I, 3). The second count charged the same persons with unlawfully, knowingly, and wilfully failing to keep records

[2] Section 601 was repealed June 30, 1952. 66 Stat. 305.

showing the amount of the purchaser's down payment in the instalment sale of the machine to Buean E. Colley (R. I, 3–4). The third count charged that the two petitioners and Deverich, Stone, and Turner, on May 17, made an instalment sale of a sewing machine to Evelyn Allen and extended credit knowing that other credit had been extended therewith, so that the total amount of credit in connection with the sale exceeded 75 percent of the sale price (R. I, 4). The fourth count charged that the persons mentioned in count three conspired to violate Sections 601 and 603 of the Act and Regulation W by making the sale of the machine to Evelyn Allen as alleged in count three (R. I, 4–5).

The jury found all of the defendants guilty as charged (R. 8). Petitioners were given concurrent sentences of imprisonment for one year and a $2,500 fine on each of the four counts, with nine months of the jail sentence suspended, and the fines suspended on all but one of the four counts (R. I, 10–11). On appeal (R. I, 13–14) their convictions were affirmed by a divided court (R. I, 127–128).[2]

This Court granted certiorari, vacated the judgments, and remanded the case to the Court of Appeals for reconsideration in light of the

[2] The court below reversed the convictions of Deverich and Stone on the ground of insufficient evidence (R. I, 117–118, 123). Turner was given a suspended sentence, placed on probation, and did not appeal (R. I, 9).

Government's confession of error. 345 U. S. 968. The Court of Appeals, again by a divided court, adhered to its previous opinion (R. 3).

The evidence may be summarized briefly as follows:

Petitioners Gordon and Tempkin were engaged in the business of selling new and used sewing machines as a partnership under the name of National Stores, first in Los Angeles and later in Salt Lake City, Utah, where the sales laid in the information were made (R. I, 17, 32, 79–80).

An intensive newspaper and radio advertising campaign, for low priced rebuilt sewing machines to be purchased on time, stimulated sales. In most instances new and more expensive machines instead of the rebuilt models were sold, thereby increasing the salesmen's commissions. One salesman testified that he made about 50 sales, in about 80 percent of which he took "I. O. U.'s" for down payments; that these were turned into the company office and treated as cash as far as the company was concerned; and that he was paid the full amount of his commissions irrespective of the down payments. He testified that the management told the salesmen to procure the required 25 percent down payment, but to accept an "I. O. U." for it if they could not get it otherwise. (R. I, 29–30, 86, 87.)

Regarding the Colley sale, which formed the basis of counts one and two, one Tempkin made the sale at the company store. Colley paid $1.00

to hold the machine until his next payday when he brought in an additional $15.00 before taking the machine away. A Mr. Tempkin, in the presence of Mrs. Colley on the date of the sale, signed the conditional sales contract, showing the price as $152.95 with a stated down payment of $38.95, but the signature on the contract was obliterated. The receipt for the original $1.00 bore a signature "E. Tempkin." Colley later made additional payments of $4.00 and $3.00 on the down payment to a female employee at the store, $23.00 being the total amount paid on the stated down payment of $38.95. (R. I, 31–38, 72, 103–104, 109.) There were two Tempkins connected with the organization, the petitioner Eli and an Irving Tempkin (R. 73). The Government's evidence did not identify which of the Tempkins made this sale.

In the Allen sale forming the basis of counts three and four, the salesman Turner made the sale after bringing the machine to the purchaser's house. The conditional sale contract showed the price of $152.95 including tax, with a down payment of $38.95. The purchaser paid only $13.00 of this stated down payment, signed three "I. O. U.'s" for $6.50 each, and on subsequent dates mailed in envelopes addressed to the company, with the salesman's name on the inside, three money orders for $6.50 each. The obligation for the balance of the down payment was to the salesman alone. (R. I, 41–45, 70, 104.)

There was also evidence as to numerous other instalment sales of sewing machines to persons other than those named in the information, where less than the required 25 percent down payment was made at the time of the purchases (R. I, 46, 51, 52, 54–55, 56, 57, 64–65, 66, 68–69, 104, 105, 106).

Petitioner Gordon was the general manager, and gave talks at sales meetings at the Salt Lake City store. He resided in Los Angeles and visited the Salt Lake City store two or three times during 1951. (R. I, 29, 73.) Gordon identified company records showing proper down payments by purchasers, and the deposits of these in a Salt Lake City bank (R. I, 74–76, 106–107). Gordon denied instructing any company employees that they could waive the down payment required by Regulation W, and testified that he had no knowledge of any transactions where less than the down payment was required, until the time of a hearing before the Federal Reserve Board about such discrepancies (R. I, 78–79, 82). Gordon admitted that at the end of the hearing he stated: "Everything that isn't right has been discontinued" R. I, 85).

DISCUSSION

All three judges in the court below agreed that, in the words of the dissenting judge, the "evidence is sufficient to sustain a conclusion that the partners had reason to know that the regulations were being violated by their employees" (R. I,

123–124). The basis of the dissent below and petitioners' principal contention in this Court is that the case was not submitted to the jury under proper instructions.[4] This argument stems from the trial court's charge that "the knowledge of a partner is chargeable to the other partner, and the knowledge of an agent or a servant is chargeable to the employer," if the knowledge of the agent was obtained while engaged in the business of the employer in the scope of his employment (R. I, 92–93).[5] In the words of the majority be-

[4] Petitioner also requests that the judgments should be reversed, "[s]ince the evidence would not justify a conviction under proper instructions." (Br. 14.) However, as stated in the text, both the majority and the dissenting judges below agreed that, had the case been submitted to the jury under proper instructions, a verdict of guilty could have been sustained (R. I, 119, 123–124). Accordingly, the proper disposition of this case, if the Court agrees with our position on the instructions, will be to vacate the judgments and remand for a new trial.

[5] Petitioners' other contentions are merely restatements of the same basic contention. They argue that, under the charge, a conviction for conspiracy was possible without proof that they had knowledge of the conspiracy (Pet. 13–14). However, the court, after describing the offense of conspiracy (R. I, 95–96), stated:

"* * * that is a question * * * which the court submits to you for your determination under count 4, whether or not, as the court has defined the word 'conspire' to you, from all the facts and circumstances in this case you find that there was an agreement, or an understanding, or a scheme to violate the law of the United States; * * *"

Nevertheless, since the general instruction as to imputing knowledge preceded the discussion of the specific counts, it is possible that the jury could have thought that, under the

low, "[w]hat the court did in effect was to make wilfulness an essential element of the offenses charged in the information, and to charge the employers [petitioners] with the guilty knowledge and acts of the employees in determining the question of wilfulness" (R. I, 121).

On the question whether this charge was correct, the Government adheres to the position expressed in the memorandum submitted to this Court when this case was first before it, *i. e.*, that "it was error for the court below to affirm the conviction of petitioners on a charge which did not require that they have the intention to violate the law * * *" (Memorandum for the United States, No. 688, O. T. 1952, p. 9).

1. It is fundamental to our jurisprudence that, in the words of the Court of Appeals, "criminal guilt is personal to the accused; * * * wilfulness or a guilty mind is an essential ingredient of a punishable offense, and * * * one cannot intend an act in which he did not consciously participate, acquiesce, or have guilty knowledge." (R. I, 120.) A corollary of this, as the Court of Appeals also recognized, is that "courts have been reluctant to hold the master or the employer criminally responsible for the acts of his agent or employee

instructions, the same general rule applied to all counts. We therefore agree that the case must stand or fall on the validity of this general instruction.

Similarly petitioners' attack on the sufficiency of the evidence (Pet. 15) is merely upon the use of the standard set forth in the charge as quoted above.

which he did not authorize, counsel, advise, approve or ratify" (*ibid.*).[6] Decisions in both state and federal courts have uniformly held that the doctrine of *respondent superior,* which imposes civil liability on the principal for acts of an agent done in the course of the master's business, is not apposite in criminal cases.[7] In the partnership context, this rule, which has been widely applied to free partners from criminal liability for the crimes of their copartners or others acting on behalf of the firm,[8] was well stated in *United States* v. *Cohn,* 128 Fed. 615, 623–624 (S. D. N. Y.):

> It is a rule in criminal cases that a partner is not charged by the criminal acts of his copartners, or others acting in behalf of

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[6] See, generally, Sayre, *Criminal Responsibility for the Acts of Another*, 43 Har. L. Rev. 689.

[7] *Lurding* v. *United States*, 179 F. 2d 419 (C. A. 6); *Paschen* v. *United States*, 70 F. 2d 491 (C. A. 7); *Beck* v. *United States*, 33 F. 2d 107, 112 (C. A. 8); *Nobile* v. *United States*, 284 Fed. 253 (C. A. 3); *United States* v. *Corlin*, 44 F. Supp. 940 (S. D. Calif.); *United States* v. *Food and Grocery Bureau of Southern California*, 43 F. Supp. 966 (S. D. Calif.); *People* v. *Jarvis*, 27 P. 2d 77 (Cal.); *People* v. *Armentrout*, 1 P. 2d 556 (Cal.); *State* v. *Burns*, 9 N. W. 2d 518 (Minn.); *State* v. *Ledbetter*, 285 S. W. 793 (Mo.); *State* v. *Woolsey*, 259 P. 826 (Mont.); *Lovelace* v. *State*, 2 So. 2d 796 (Miss.); *People* v. *Green*, 133 Pac. 334 (Cal.).

[8] *United States* v. *Ward*, 168 F. 2d 226 (C. A. 3); *Sleight* v. *United States*, 82 F. 2d 459 (C. A. D. C.); *Levin* v. *United States*, 5 F. 2d 598 (C. A. 9); *United States* v. *Cohn*, 128 Fed. 615 (S. D. N. Y.); *Vostre* v. *State*, 195 So. 151 (Fla.); *Munoz* v. *State*, 99 So. 555 (Fla.); *State* v. *Maurisky*, 129 A. 714 (Conn.); *State* v. *Burns*, 126 N. W. 572 (S. D.).

> the firm, unless he has knowledge thereof. The law in relation to partnership is that the partner agrees to be bound for all acts done in obedience to the law, to which there are attached certain civil liabilities for fraudulent acts or representations done or made by a partner or an agent for the purpose of affecting the firm's business. It is not considered that, in the absence of some special statute bearing upon the particular acts of a firm, whereby each partner is made the subject of punishment, one partner can be found guilty of a crime because his partner or agent has done acts that would justify his or their punishment.

We think it clear, therefore, that under ordinary doctrines of criminal responsibility, petitioners, merely because they were members of a partnership, could not be charged with the crimes of their agents.

The Court of Appeals held that these traditional standards of criminal responsibility were inapplicable here in that businessmen coming within the purview of consumer credit restrictions were under a duty, not only to refrain from wilful violations thereof, but to prevent their agents from so doing (R. I, 121–122). The court's premise clearly was that the importance to the public of securing compliance with consumer credit regulations outweighed the social interest in requiring that criminal guilt be personal. This philosophy has heretofore found acceptance pri-

marily in connection with so-called "public welfare offenses,"[9] arising under statutes which have eliminated the traditional intent or wilfulness element. See *infra*, pp. 13–15.

Although the offense here involved could well have fallen within the "public welfare offense" category, this rationale does not, *ipse dixit*, apply, for, as the Court of Appeals explicitly recognized, by the statute, "wilfulness is specifically made a prerequisite to guilt" (R. I, 121). This, without more, would appear to make plain the legislative purpose to punish only deliberate knowing violations. Cf. *Zimberg* v. *United States*, 142 F. 2d 132, 137–138 (C. A. 1), certiorari denied, 323 U. S. 712. See also *Browder* v. *United States*, 312 U. S. 335, 341; *United States* v. *Balint*, 258 U. S. 250, 253. The court below attempted to surmount this difficulty in holding that the wilfulness element could be supplied by the guilty knowledge of petitioners' employees, citing as authority, *Inland Freight Lines* v. *United States*, 191 F. 2d 313 (C. A. 10), a case involving a corporate defendant (*ibid.*).[10] It has, of course,

[9] For discussion of the development of the law regarding such offenses, see Sayre, *Public Welfare Offenses*, 33 Col. L. Rev. 55 (1933).

[10] In passing, it should be noted that *Inland Freight Lines* does not unequivocally sustain the trial court's instruction in the present case. The Court of Appeals there held that there was sufficient evidence to justify submission to the jury of the question whether the corporate defendant had "knowingly and wiltully kept * * * false logs as part of its records * * *" (191 F. 2d at 316). However, the Court of Appeals

long been true that corporations could be convicted of crime on the basis of acts of their agents, *New York Central & H. R. R. Co.* v. *United States,* 212 U. S. 481, and this rule has been applied where intent is an element of the offense. *C. I. T. Corporation* v. *United States,* 150 F. 2d 85 (C. A. 9); *United States* v. *George F. Fish Inc.,* 154 F. 2d 798 (C. A. 2); *American Medical Ass'n* v. *United States,* 130 F. 2d 233, 253 (C. A. D. C.); *Mininsohn* v. *United States,* 101 F. 2d 477 (C. A. 3).

While the instant case involves neither a traditional "public welfare offense" nor a corporate defendant, the very existence of such exceptions to the general rule that guilt is personal makes clear that there are circumstances in which a paramount public necessity may warrant conviction of crime in the absence of actual guilty knowledge. Whether the present situation warrants such abrogation of conventional standards of criminal guilt is the fundamental issue now before this Court.

2. In support of the Court of Appeals' conclusion that guilty knowledge could be imputed in the case of business partners as well as corpora-

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reversed because the instructions under which the question was sent to the jury permitted the jury to find the defendant guilty merely on the basis of negligence in accepting the false logs without investigation (*ibid.*). The court defined "wilfully" as used in the regulatory statute there involved as "deliberately, voluntarily, or intentionally as distinguished from inadvertence or ordinary negligence" (*ibid.*).

tions, it should be noted that the present case does not involve a traditional common-law crime. Cf. *Morissette* v. *United States,* 342 U. S. 246. It is clear, we think, that if it did, the court below would not have sustained convictions based upon "constructive" knowledge or "vicarious responsibility" (R. I, 122). It did so here because sales in violation of consumer credit regulations tend to thwart the legislative objective of controlling the volume of credit throughout the economy. In so doing, the court below clearly assimilated the regulatory statute here involved to those defining the "public welfare" offenses. As this Court has observed with respect to such legislation, it "dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States* v. *Dotterweich,* 320 U. S. 277, 281.[11] Typical regulatory statutes, violations of which has been made a crime irrespective of intent, are statutes governing the

[11] The Court further stated (320 U. S. at 284): "Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting."

sale of liquor,[13] narcotics,[13] and foods and cosmetics.[14] Under such statutes employers have been held criminally responsible for the acts of their employees,[15] and partners for the violations committed by their copartners,[16] on the theory that a duty imposed by statute upon one engaged in a particular line of business cannot be escaped by delegating responsibilities to others.[17]

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[13] See *United States* v. *Wilson*, 59 F. 2d 97 (W. D. Wash.); *United States* v. *Buchanan*, 9 Fed. 689 (W. D. N. C.); *State* v. *Sobelman*, 271 N. W. 484 (Minn.); *Com.* v. *Stevens*, 29 N. E. 508 (Mass.); Annotation, 139 A. L. R. 306.

[13] See *United States* v. *Balint*, 258 U. S. 250; *United States* v. *Behrman*, 258 U. S. 280.

[14] See *United States* v. *Dotterweich*, 320 U. S. 277; *United States* v. *Parfait Powder Puff Co.*, 163 F. 2d 1008 (C. A. 7); *United States* v. *Kaadt*, 171 F. 2d 600 (C. A. 7).

[15] *United States* v. *Buchanan*, 9 Fed. 689 (W. D. N. C.); *United States* v. *Parfait Powder Puff Co.*, 163 F. 2d 1008 (C. A. 7); *Ex parte Marley*, 175 P. 2d 832 (Cal.); *Meigs* v. *State*, 114 So. 448 (Fla.); *Com.* v. *Stevens*, 29 N. E. 508 (Mass.); Annotation, 139 A. L. R. 306.

[16] *Ex parte Casperson*, 159 P. 2d 88 (Cal.); *Lunsford* v. *State*, 34 S. E. 2d 731 (Ga.); *Spokane* v. *Patterson*, 89 Pac. 402 (Wash.).

[17] See, e. g., *United States* v. *Buchanan*, 9 Fed. 689, 692 (W. D. N. C.), where the court observed:

"The defendant had undertaken a public business under a license from the government, and his wife was his agent in carrying on this business, and she omitted to perform a duty imposed by law upon persons engaged in such licensed employment.

"As a general rule, a criminal act of a servant or agent does not subject the master or employer to any criminal responsibility, unless he directed or co-operated in such act, or the employment necessarily resulted in such unlawful act. It is, however, well settled that where a master, owing a certain duty to the public, entrusts its performance to a servant,

It cannot be gainsaid that for many purposes the offenses here are quite similar to the public welfare offenses. As this Court stated in *Morissettee* v. *United States,* supra, at 256, "their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted." The present case appears to occupy an intermediate position between public welfare offenses not requiring criminal intent and traditional crimes of which such intent is of the essence. The Court of Appeals, as we have indicated, resolved this by retaining the wilfulness element, but, at the same time, sustaining the imputation to petitioners of the guilty knowledge and acts of their employees. This amounts, in effect, to a holding that, under this type of statute, petitioners, if they did not actually know, were under a duty to know and should have known of the wilful violations.[18]

There is some practical justification for this result. The Defense Production Act of 1950 was

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he is responsible criminally for the failure of his servant to discharge that duty, if the non-performance of such duty is a crime."

[18] In the court's words:

"The effect of this is not to dispense with wilfulness or guilty knowledge as an element of the offense. It is to charge the employer with knowledge of records he is required to keep and acts he is required or forbidden to do, and which he necessarily keeps, does or omits to do by and through his agents and employees. * * * If it be called vicarious responsibility, it is nevertheless a responsibility of him on whom the law places the duty. * * *" (R. I, 122).

to be enforced, in part, by means of criminal penalties.[19] To the extent that these sanctions were important in effectuating the legislative purpose, that purpose would have been frustrated by the insulation of employers from prosecution on the basis that unlawful sales, although wilfully made by their employees, were not the employers' acts. This is particularly true since the consumer credit provisions, by their very nature, applied largely to concerns whose actual sales would be made by subordinates. If the knowledge of these subordinates could not be imputed to their employers, thereby making the employers' knowledge in each case a matter of proof at the trial, successful prosecution might become exceedingly difficult as arrangements to conceal the complicity of the operators of the business were devised. The alternative course chosen by the court below puts upon an employer who comes within the purview of this type of regulatory statute the task of carefully policing his employees. This is onerous, but not unreasonable, since it is the employer who profits from the

[19] While the recognition of such a duty to know goes far toward negativing the wilfulness requirement of the statute, nullification does not appear to be complete since, presumably, there would be no duty to know of nonwilful violations by employees. In addition to Title VI, authorizing control of consumer and real estate credit, Title I and Title IV of the Act contained provisions imposing criminal penalties for wilful violations of any provision thereof or regulation promulgated thereunder. See 50 U. S. C. App. (Supp. V) 2073, 2109 (b).

business and who is in the best position to know how his employees are doing their work.

The present case thus appears to be subject to many of the practical necessities which, in relatively similar situations, have compelled legislatures and courts to eliminate the burden of proving wilfulness or intent.[20] It is the thrust of the opinion below that in the context of public regulatory statutes and their infringement, a business partnership, like a corporation, is a business entity which should not be shielded from criminal conviction by the professed ignorance of its members, particularly where the offense relates to the method of doing business and where the regulation violated so generally affects the method of doing business that its operation will necessarily affect the conduct of the employees of any business large enough to have employees.

3. While we have endeavored to spell out the arguments upon which the court below relied, it

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[20] The fact that the seller generally is in position to know, and the difficulty of proving knowledge have been important factors in the development of the category of crimes without intent. In *United States* v. *Balint*, 258 U. S. 250, 254, this Court observed:

"Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion."

is our belief that the considerations mentioned above are outweighed by other factors which show the contrary intent of Congress.

(a) Although the offenses here could have been put in the "public welfare" category, the use of "wilfulness" in the statute shows the Congressional intention here to follow the general rule requiring a mental element, rather than the public welfare exception. While "wilfulness" may mean different things in different contexts, *Spies* v. *United States,* 317 U. S. 492, 497, it clearly is among the terms that Congress may use "to signify an evil purpose or mental culpability." *Morissette* v. *United States, supra,* at 252. In any event, it was conceded by even the court below that the statute required some mental component.

Nor do we think that this mental component can be supplied by imputation as is true with respect to the criminal responsibility of corporate defendants. The bases for making corporations criminally responsible for the acts of their agents cannot be applied to partnerships or individual employers. First, a corporation is incapable of acting save through its agents, so that in the absence of vicarious liability corporations would be wholly immune from prosecution. The effect, as this Court noted in the *New York Central* case, *supra,* at 495–496, would be to render ineffective the large body of business regulatory law which, since most business is con-

ducted by corporations, was applicable primarily to corporations.[21] Acting through its agents, which is the only way it can act, the corporation would continue to violate the law with impunity, reaping unjustly the rewards of its crime.

Under the law as it now stands, no such disability obtains as to partnerships. A partnership is not a separate entity but is the partners themselves; it is they who own its assets, and who can be convicted for crimes which they commit for the advantage of the partnership. No immunity from criminal prosecution results from the fact that a business is run as a partnership, except for the immunity from prosecution for the criminal conduct of agents, which is available to all noncorporate employers. A second and

[21] The Court there said:

"We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter * * * and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at."

equally significant reason for limiting vicarious criminal liability to corporations is that a business partner may suffer imprisonment with all that that implies, while, of course, a corporation cannot.

(b) It is inescapably plain that the court below has, in effect, created a new category of offenses from which has been removed "the ancient requirement of a culpable state of mind." *Morissette* v. *United States, supra,* at 250. While, as we have indicated, there is some justification for this as a matter of policy, the use of "wilfulness" in the statute shows that Congress did not adopt that policy in framing this statute. Thus, this Court, in *Morissette* v. *United States, supra,* in speaking of the Government's argument that Congress had eliminated the element of intent from common-law crimes, made observations which in principle apply to judicial elimination of actual knowledge from a statutory crime of which Congress has made "wilfulness" an element. The Court said (342 U. S. at 263):

> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed

juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.

The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Here, under the trial court's instruction imputing the agents' guilty knowledge to petitioners, it would have availed petitioners nothing to prove that they had diligently but unsuccessfully sought to prevent the kind of misconduct that, despite their efforts, occurred.[22] This avoids entirely the

[22] While the Court of Appeals speaks of the "ameliorating influence of those who sit in judgment" (R. I, 122), under the trial court's instructions a jury could disregard evidence of the accused's good intentions and look only to the mental culpability of the agents in reaching their verdict of guilty.

"cluster of ideas" surrounding the word "wilfully" which Congress, presumably with knowledge of those ideas, used in the present statute. While in this type of statute that term does not imply an evil or malevolent purpose, it has been held by this Court to denote "that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and * * * to characterize 'conduct marked by careless disregard whether or not one has the right so to act'." *United States* v. *Illinois Cent. R. Co.*, 303 U. S. 226, 243, quoting from *United States* v. *Murdock*, 290 U. S. 389, 394. The concept of wilfulness is essentially personal and individual; it relates to the state of mind of the accused and not that of his agents.

We do not believe, moreover, that the public concern for efficient enforcement of regulations of this type is necessarily jeopardized by requiring a finding of actual knowledge in the case of partner or individual employer defendants. Their guilt will be established if a jury finds that they personally ordered, advised, or aided in accomplishing the proscribed sale, or if they knew of the illegal practices, took no steps to prevent them, and garnered their fruits. That is wholly different from the situation which gave rise to the vicarious responsibility of corporate defendants, and allows for the conviction of all who transgress, subject to the standards of proof normally applicable in criminal prosecutions. The want of necessity for the abrogation of the conventional

standards is illustrated by this case, where it appears that petitioners, under appropriate instructions, would in all probability have been found to have had knowledge of the unlawful practices of their salesmen. Furthermore, even if in particular cases proof of wilfulness were difficult or impossible to secure, enforcement of the law would not be at a standstill, for the statute provides for the enjoining of existing or anticipated violations of consumer credit restrictions irrespective of intent. 50 U. S. C. App. (Supp. V.) 2134.

CONCLUSION

Since the charge to the jury was improper for the reasons stated, we respectfully submit that the judgment of the Court of Appeals should be vacated and the case remanded to the District Court for retrial.

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY, III,
Assistant Attorney General.
JOHN R. BENNEY,
BEATRICE ROSENBERG,
HOWARD ADLER, Jr.
Attorneys.

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APPENDIX

Statute and Regulations Involved

The Defense Production Act of 1950, 64 Stat. 789, 812, 814, provides:

> Sec. 601. To assist in carrying out the objectives of this Act, the Board of Governors of the Federal Reserve is authorized * * * to exercise consumer credit controls in accordance with and to carry out the provisions of Executive Order Numbered 8843 (August 9, 1941) until such time as the President determines that the exercise of such controls is no longer necessary * * *.
>
> * * * * * *
>
> Sec. 603. Any person who willfully violates any provision of section 601 or 602 or any regulation or order issued thereunder, upon conviction thereof, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Part 222—Consumer Regulation W, September 8, 1950, 15 F. Reg. 6118, as amended October 16, 1950, 15 F. Reg. 6931, provides:

> § 222.2 *General requirements and registration—*
>
> (a) *General requirements.* Each person engaged in the business of making instalment sales * * * is referred to in this part as a "Registrant"; and no Registrant shall make or receive any payment which constitutes or arises directly or indirectly out of any such credit extended by him * * * except on the following conditions:

(1) He must have a license, and each Registrant is hereby granted such a license * * *.

(2) The credit extended * * * must comply with the applicable requirements of this part.

* * * * *

§ 222.3 *Installment sales; general rules* * * *

(a) *Down payment and maturity.* There shall be a down payment not less than that specified for the listed article in § 222.9, such down payment to be calculated as therein specified; and the time balance specified in § 222.6 (c) shall have a maturity not exceeding the maximum maturity specified for the listed article in § 222.9.

(b) *Amounts and intervals of installments; record.* * * * The information specified in § 222.6 (c) shall be set forth in a bona fide record of any transaction subject to this section.

(c) *Time of down payment.* Tne down payment shall be obtained at or before the time of delivery of the listed article * * *.

§ 222.6 *Certain technical provisions.* * * *

* * * * *

(c) *Record of instalment sale.* The record of an instalment credit arising from the sale of a listed article and required by § 222.3 (b) shall set forth (in any order) the following information:

(1) A brief description identifying the article purchased;

(2) The cash price of the article;

(3) The amount of the purchaser's down payment (i) in cash and (ii) in goods accepted in trade, together with a brief description identifying such goods and stat-

ing the monetary value assigned thereto in good faith;

(4) The amount of any insurance premium for which credit is extended and of any finance charges or interest by way of discount included in the principal amount of the obligation, or the sum of these amounts;

(5) The time balance owed by the purchaser, which is the sum of items (2) and (4) minus item (3); and

(6) The terms of payment.

* * * * *

(i) *Side loan to make down payment.* A Registrant shall not extend any credit for financing the purchase of any listed article if he knows or has reason to know that there is, or that there is to be, any other credit of any kind extended in connection with the purchase of the listed article which would bring the total amount of credit extended in connection with such purchase beyond the amount of instalment credit permitted by this part; but, if the Registrant accepts in good faith a written statement signed by the obligor that no such other credit exists or is to be extended, such statement shall be deemed to be correct for the purposes of the Registrant.

§ 222.9 *Supplement.*

Part 1. *Listed articles, down payments, loan values.* For the purposes of this part, the following articles, whether new or used, are "listed articles", and the following required down payments and maximum loan values are prescribed * * *

Group B—25 percent minimum down payment, 75 percent maximum loan value:

* * * * *

9. Sewing machines designed for household use.

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No petition printed.

FILED
MAY 18 1954
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

NO. 530, MISC.

TOM A. GORDY,

Petitioner

V.

STATE OF TEXAS,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BEN SHEPPERD
Attorney General of Texas

RUDY G. RICE
Assistant Attorney General

ROBERT O. FAGG
Assistant Attorney General

ATTORNEYS FOR RESPONDENT,
THE STATE OF TEXAS

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IN THE

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OCTOBER TERM, 1953

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TOM A. GORDY,

Petitioner,

V.

STATE OF TEXAS,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

Opinion Texas Court of Criminal Appeals, October 28, 1953, Tom Gordy, Appellant, v. The State of Texas, Appellee (not yet published); Opinion on First Motion for Rehearing, December 9, 1953 (not yet published); Second Motion for Rehearing, overruled without opinion, January 13, 1954.

JURISDICTION

Petitioner alleges jurisdiction under 28 U.S.C.A., Sec. 1257 (3), alleging infringements of rights, privileges and immunities guaranteed him under the Constitution of the

United States by virtue of the Fifth and Fourteenth Amendments thereto. (Pages 3 and 4 of Petition for Writ of Certiorari.)

QUESTIONS PRESENTED

1. Does this Court have jurisdiction?

2. The Petitioner alleges he was deprived of his constitutional rights guaranteed by the 5th and 14th Amendments to the Constitution of the United States because the trial court abused its discretion in overruling Petitioner's motion to quash the jury panel and declare a mistrial on grounds of inability to obtain a fair and impartial jury, and the need for time for public sentiment to cool.

3. The Petitioner alleges he was deprived of his constitutional rights guaranteed by the 5th and 14th Amendments to the Constitution of the United States because of the trial court's action in overruling Petitioner's motion for postponement for thirty days to enable the Petitioner's attorney time to acquaint himself with the facts of the case and prepare for trial.

STATUTES INVOLVED

U. S. Const. Amendments V and XIV.

Texas Code of Criminal Procedure (Vernon 1948), Articles 563 and 564.

Texas Penal Code (Vernon 1948), Article 719e.

Title 28, Sec. 1257, U.S.C.A. (3).

Supreme Court Rules, Rule 12, as amended to Sept. 1, 1950.

STATEMENT OF THE CASE

Petitioner was convicted in the County Court of Winkler County, in a trial before a jury, of the offense of unlawfully transferring possession of horse meat to a person and knowing, or in the exercise of reasonable discretion should have known, that the person receiving such horse meat intended to keep it in his possession with the intent to sell it as food for human consumption. The conviction is under Section 3, Article 719e of the Texas Penal Code, as amended, and the punishment assessed at confinement in the county jail for a period of two (2) years and a fine of $1,000.00. This is the maximum penalty for the offense. The case was appealed to the Texas Court of Criminal Appeals, and in an opinion thereon dated October 28, 1953, the Court, after reviewing the above facts and hearing argument, stated that the evidence was sufficient to support the verdict, and that there was no error shown, and the judgment of the trial court was affirmed. The first motion for rehearing was denied on December 9, 1953 by written opinion of that date, and the second motion for rehearing was denied without written opinion on January 13, 1954.

ARGUMENT

1. Does this Court have jurisdiction?

This Petitioner has failed to show this Court that a particular federal question was properly raised on the appeal of this case from the trial court to the Texas Court of Criminal Appeals. Examination of the decision rendered by the Texas Court of Criminal Appeals and of the opinion on first motion for rehearing fails to disclose any ruling by that court on any federal question. The practice in this State requires that the Court of Criminal Appeals pass on all questions properly presented to it on appeal, and where an appellant fails to properly present any question on appeal, the Court is not required to pass on it. Stokes v. State, 136 Tex.Crim. 443, 125 S.W.2d 311 (1939). If there were constitutional matters concerned here, the Court must have passed on them and found no violation, or, in the alternative, the Court having made no mention of constitutional violations, if any, they were not properly presented. Where the State appellate court makes no express ruling pertaining to a federal question but ignores or fails to notice same, this Court has established the rule that it will decline jurisdiction where it appears that the question was not raised in the trial court in accordance with State practice. Mutual Life Insurance Company v. McGrew, 188 U.S. 291 (1903); Layton v. Missouri, 187 U.S.

356 (1902); Jacobi v. Alabama, 187 U.S. 133 (1902); Morrison v. Watson, 154 U.S. 111 (1894).

In such cases, in the absence of affirmative showing to the contrary, it will be inferred by this Court that the question was not decided upon in the State court because of its untimely presentation. Chicago, Indiana and L.R. Company v. McGuire, 196 U.S. 128 (1905). If the Supreme Court (Court of Criminal Appeals) did in fact consider the federal question, the burden was on the Plaintiff to show it. There is no presumption that the Court considered such question. Jacobi v. Alabama, 187 U.S. 133 (1902).

This Petitioner's contentions relating to absence of due process are laid under the Fifth Amendment to the Constitution of the United States. It is well settled that this Amendment constitutes a restriction on the Federal Government and its agencies, but not on the States. Palko v. State of Connecticut, 302 U.S. 319 (1937).

If Petitioner's contentions concerning due process could be said to arise from the requirements of the Fourteenth Amendment to the Constitution of the United States, it is well settled that the due process requirement of the Fourteenth Amendment pertains to the Constitution and laws of the particular state and not to the process of another state or of the United States. Petitioner alleges no violation of the Texas

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Constitution.

Due process in one State may not be due process in another. Palko v. State of Connecticut, 302 U.S. 319 (1937); Dohany v. Rogers, 281 U.S. 363 (1930); Maxwell v. Dow, 176 U.S. 581 (1900); Hurtado v. California, 110 U.S. 516 (1884).

While due process is a matter of substance as well as procedure, it does not guarantee against judicial error. The essential elements of due process are notice and opportunity to be heard and to defend, before a competent tribunal, in an orderly proceeding adapted to the nature of the case, which is uniform and regular, and in accordance with established rules which do not violate fundamental rights. Brown v. South Carolina, 298 U.S. 639 (1936); Owens v. Battenfield, 280 U.S. 605 (1929); Caldwell v. Texas, 137 U.S. 692 (1891); Ex parte Wall, 107 U.S. 265 (1882). From a careful reading of the record we believe the conditions exist that make for a fair trial under due process requirements in Texas courts. Where these conditions are fulfilled, there is no violation of due process of law. Dohany v. Rogers, 281 U.S. 363 (1930); Frank v. Mangum, 237 U.S. 309 (1915).

An examination of the record relating to the trial of the Petitioner provides a clear showing that all of the

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due process requirements pertaining to criminal proceedings in the State of Texas were fully complied with.

2. The Petitioner alleges he was deprived of his constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States because the trial court abused its discretion in overruling Petitioner's motion to quash the jury panel and declare a mistrial on grounds of inability to obtain a fair and impartial jury, a fair and impartial trial, and the need for time for public sentiment to cool.

The jury panel admitted that they had read newspaper articles about the case and had discussed or heard the case discussed. By bills of exception No. Four (4) and No. Five (5) it is certified that each member of the jury panel, with the exception of one, stated that they had formed no opinion as to the guilt or innocence of the Petitioner, and they also stated that they could and would disregard everything they had heard and read, and that they would render a fair and impartial verdict based only on the evidence brought forth in the trial.

In the opinion of the Court of Criminal Appeals in this case the Honorable Court states:

"It is noted by the court that every member of the jury panel except one, who was excused, stated that he had no opinion as to the guilt or innocence of the appellant, thus it will be seen that there is an absence of any showing that any prejudice found its way into the jury box of the jury that tried him. Hence no error is shown. . . .

"Finding no reversible error, the judgment of the trial court is affirmed."

In the opinion on motion for rehearing the Court said:

"Appellant's esteemed counsel in an excellent motion urges us to reconsider our holding herein. He contends that he should have secured a postponement so that public sentiment against appellant might cool and that his case is on all fours with our holding in Rogers v. State, 236 S.W.2d 141. In many respects he is correct in his contention. Two distinguishing factors, however, do exist.

1. This is a misdemeanor case.

2. In the Rogers case much importance was attached to the fact that 44 out of a venire of 105 examined were excused because of fixed opinions. In the case at bar only one was excused for such reason. We have again re-read the examination of the panel in this case and cannot bring ourselves to conclude that prejudice against the accused found its way into the jury box. . . .

"The motion for rehearing is overruled."

The trial court clearly did not err in overruling Petitioner's motion to quash the jury panel and declare a mistrial.

In Hogan v. State, 127 Tex.Crim. 182, 74 S.W.2d 988 (1934), the rule is announced that in selecting jurors those matters involving opinions, feelings, and scruples of a proposed juror, are matters whose decision as to fixedness of opinion or extent to which opinion might affect juror's action, are always first left to the decision of the talesman and if he feels he can try the case impartially, his qualification is then for the trial court.

In Benavidez v. State, 143 Tex.Crim. 481, 154 S.W. 2d 260 (1941), (cert.den. 62 S.Ct. 794, 315 U.S. 811, 86 L.Ed. 1210), it was held that the trial court did not err in refusing to sustain the defendant's challenge for cause to certain jurors testifying that they had formed an opinion as to defendant's guilt from street talk and gossip, where such jurors testified that they had not talked with any witness and knew nothing of the facts save rumors and gossip, and that their opinion was not fixed and could be set aside, and that they could try the case on the evidence presented to them and the trial court's charge.

The members of the jury panel from which the jury in this case was selected stated that they had no opinions as to guilt or innocence of Petitioner. There was no basis for Petitioner's motion to quash the jury panel, and no showing of prejudice.

Prejudice is not a ground for postponement of continuance. Accord, Miller v. State, 31 Tex.Crim. 473, 20 S.W. 1103 (1893); Jones v. State, 37 Tex.Crim. 433, 35 S.W. 975 (1896). In Hill v. State, 152 Tex.Crim. 248, 212 S.W.2d 143 (1948), it was held that the Court did not act improperly in overruling the motion for continuance on the ground of public feeling in the county. The Court stated that the motion for continuance is not a statutory ground and therefore the motion is addressed to the sound discretion of the trial court.

The Texas Court of Criminal Appeals in its opinion on appeal of this case said:

> "Bills of Exception No. One (1) and Two (2) complaining of the overruling of appellant's motion for continuance or postponement, the grounds of the motion being that his attorneys had not had sufficient time to prepare for trial, and that a postponement was necessary in order that unfavorable public sentiment against appellant might subside.
>
> "This motion was not a statutory motion for continuance, but one addressed to the sound discretion of the trial judge, and no abuse of such discretion appears. Jones v. State, 240 S.W.2d 771; Hill v. State, 152 Tex.Crim. 248, 212 S.W.2d 143."

In Handy v. State, 139 Tex.Crim. 3, 138 S.W.2d 541 (1939), the Court said:

> "The burden is upon the appellant to prove the existence of such prejudice, and, where evidence is heard, the issue is to be determined by the trial court. The discretion is

> upon the trial court to weigh the evidence, and, if from it there arises two conflicting theories, the trial court has the discretion to adopt either. In the absence of the abuse of this discretion, the judgment will not be disturbed on appeal. If, however, the evidence is such that it leads to the conclusion that the bias, prejudice, or prejudgment of appellant or his case is such as renders it improbable that a fair and impartial trial can be given him, the trial court is without discretion to refuse the application."

In Willis v. State, 128 Tex.Crim. 504, 81 S.W.2d 693 (1935), the Court lays down the rule that citizens who have merely read in newspapers reasonably accurate accounts of crime are not for that reason alone disqualified to serve on a jury impaneled to try such crime. Also the Court says:

> "Nothing is better settled than that in determining whether the trial court abused his discretion in refusing change of venue in each case must be decided upon its own facts. No two cases are alike. . . . We cannot lay down the rule that because men read the newspapers and thus make contact with what therein appears, they must be held disqualified to serve as jurors. There was no defense in this case. Appellant did not take the stand. . . . The burden is on the appellant to prove the existence of such prejudice, and, where evidence is heard, the issue is to be determined by the trial court. The discretion is upon the trial court to weigh the evidence, and, if from it there arises two conflicting theories the trial court has the discretion to adopt either. . . ."

In Dennis v. United States, 339 U.S. 162 (1950) this Court reaffirmed the principles set down in United States v.

Wood, 299 U.S. 123 (1936), and Frazier v. United States, 335 U.S. 497 (1948), wherein it was stated that while impaneling a jury the trial court has a serious duty to determine the question of actual bias, and broad discretion in its rulings on challenges therefor. The Dennis case was one in which the petitioner was convicted for willfully failing to appear before a congressional committee in compliance with a duly served subpoena. On voir dire examination, government employees on the jury panel were interrogated individually by petitioner's counsel as to whether the fact that petitioner was a Communist, the attitude of the Committee on Un-American Activities toward Communists, or the recently issued Executive Order 9835 providing standards for the discharge of employess upon reasonable grounds for belief that they are disloyal to the Government, would prevent them from rendering a fair and impartial verdict. Seven gave negative answers and said they could render a fair and impartial verdict. They were permitted to serve on the jury. There was no proof of actual bias, and petitioner's challenge of these employees for cause was denied. Held; In the circumstances of this case, petitioner was not denied the trial "by an impartial jury" guaranteed by the Sixth Amendment.

The record in this case discloses that there is no evidence presented that the panel was improperly selected or

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otherwise disqualified.

Change of venue as such is provided in misdemeanor cases by Articles 563 and 564 of The Texas Rules of Criminal Procedure, as amended. The Petitioner makes no claim to come within any of the provisions of those statutes. Acts 1953, 53rd Leg., p. 713, ch. 276, Secs. 1 and 2.

3. The Petitioner alleges he was deprived of his constitutional rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States because of the trial court's action in overruling Petitioner's motion for postponement for thirty days to enable the Petitioner's attorney time to acquaint himself with the facts of the case and prepare for trial.

The facts show that Petitioner was arrested on the charge in this case on January 31, 1953. Petitioner immediately employed H. L. Roberson, an attorney, who later withdrew from the case on February 9, 1953. On this date Petitioner employed Murry J. Howze. Attorney Howze was unable to confer with Petitioner and begin investigation of the case until February 11, 1953. It was shown that an attorney by the name of Guy McFarland had been employed to represent Petitioner on the examining trial alone. Petitioner's attorney was employed on February 9, 1953, one week prior to date of trial.

In Porter v. State, 86 Tex.Crim. 23, 215 S.W. 201 (1918), it was held that where the accused had practically two days to prepare for trial and had experienced attorneys that a motion to postpone to grant additional time to investigate veniremen was properly overruled.

This matter was addressed to the sound discretion of the trial court, and in the absence of an abuse of discretion, which does not appear from the facts of this case, the action of the trial court will not be disturbed. Accord, Gilbreath v. State, 136 Tex.Crim. 299, 124 S.W.2d 996 (1939); Williams v. State, 145 Tex.Crim. 406, 168 S.W.2d 261 (1943); Jones v. State, 156 Tex.Crim. 248, 240 S.W.2d 771 (1951).

Refusal to grant continuance in a case set for trial 13 days after a copy of the indictment was served, 12 days after an attorney had been appointed by the Court to represent the defendant, and 7 days after another attorney had been employed by the defendant, was not an abuse of discretion. Mason v. State, 74 Tex.Crim. 256, 168 S.W. 115 (1914). Accord, Bradley v. State, 96 Tex.Crim. 81, 256 S.W. 292 (1923). Other cases showing that overruling motion to postpone murder trial for insufficnent time for preparation was not abuse of discretion are McKenzie v. State, 116 Tex. Crim. 395, 11 S.W.2d 172 (1928),(rehearing den. 12 S.W.2d 578); Jackson v. State, 115 Tex.Crim. 395, 27 S.W.2d 1102 (1930).

Federal cases follow the same pattern. In Delaney v. U.S., 199 F.2d 107 (C.C.A. 1st 1952), at page 115, the Court said:

> "In passing upon motions for continuance, the trial judge of course has a wide area of discretion; and appellate courts will properly give great weight to a determination of the trial judge that extra court room publicity was not of sort likely to prejudice the defendant at the trial, or to determination that sufficient time had elapsed since the damaging publicity so that a fair trial might reasonably be assured. . . ."

As to both continuance and publicity the Court has wide discretion.

In U.S. v. Vrilium Products Company, 185 F.2d 3 (C.C.A. 7th 1950) (cert.den. 340 U.S. 947) 95 Law Ed. 683, the Court said that the trial court's action upon application for continuance is purely a matter of discretion and not subject to review by appellate court unless it is clearly shown that such discretion has been abused. Accord, Davenport v. U.S., 197 F.2d 157 (C.C.A. 5th 1952) (cert.den. 344 U.S. 835).

In Ray v. U.S., 197 F.2d 268 (C.C.A. 8th 1952), it is stated that whether time allowed counsel for defendant in a criminal prosecution for preparation for trial is sufficient is dependent upon the nature of the charge, the issue presented, counsel's familiarity with the applicable law and the pertinent facts, and the availability of pertinent witnesses. In U.S. v. Yodock, 97 F.Supp. 307 (Middle D. Penn.

1951), at page 311, only five minutes with counsel does not afford a basis for relief. Each case must be examined individually.

In this case Petitioner was represented by able counsel who was familiar with the law and the facts of the case. As the trial court and the Court of Criminal Appeals have carefully reviewed the proceedings and have found no abuse of discretion from the examination and re-examination of the records, this decision should not be disturbed.

Another Federal case in point is U.S. v. Wight, 176 F.2d 376 (C.C.A.2d 1949), where the Court said at page 379 of the opinion:

> "The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce, and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for issuance of a writ of habeas corpus or the granting of a petition pursuant to 28 U.S.C. 2255. . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the court and make the proceeding a farce and a mockery of justice."

In this case cited above counsel had fifteen minutes to consult with his client.

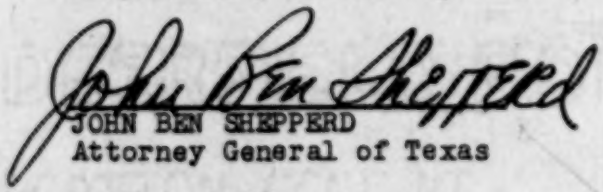
It is clearly apparent from the record in this case that Petitioner was afforded ample time and able assistance to

prepare his case and no error or abuse of discretion is shown.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be denied.

Respectfully submitted,



JOHN BEN SHEPPERD
Attorney General of Texas

RUDY G. RICE
Assistant Attorney General

ROBERT O. FAGG
Assistant Attorney General

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willfully violates" regulations promulgated under the Act shall be guilty of crime. The jury was instructed that the knowledge of petitioners' employees was chargeable to petitioners in determining petitioners' wilfulness. Because of the instruction, the Government has confessed error. We agree, and accordingly reverse the judgment and remand the case to the District Court for retrial. *John S. Boyden* argued the cause for petitioners. With him on the brief was *Allen H. Tibbals*. *John R. Benney* argued the cause for the United States. With him on the brief were *Acting Solicitor General Stern, Assistant Attorney General Olney* and *Beatrice Rosenberg*. Reported below: See 203 F. 2d 248.